

EXHIBIT 6

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re: : Chapter 11
: :
: Case No.
W.R. GRACE & CO., et al, : 01-01139 JKF
: :
: (Jointly
Debtors : Administered)

Friday, May 15, 2009

Oral deposition of DAVID T.

AUSTERN, ESQUIRE, taken pursuant to
notice, was held at the offices of ORRICK
HERRINGTON & SUTCLIFFE, LLP, Columbia
Center, 1152 15th Street, N.W.,
Washington, DC 20005-1706, commencing at
10:07 a.m., on the above date, before
Lori A. Zabielski, a Registered
Professional Reporter and Notary Public
in and for the Commonwealth of
Pennsylvania.

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1 PROCEEDINGS

2
3
4 MR. GUY: We will follow the
5 federal rules.

6
7 DAVID T. AUSTERN, ESQUIRE,
8 after having been first duly
9 sworn, was examined and testified
10 as follows:

11 EXAMINATION

12 BY MR. BROWN:

13
14 Q. Good morning, Mr. Austern.
15 My name is Michael Brown. I represent
16 OneBeacon American Insurance Company,
17 Seaton Insurance Company, GEICO, and
18 Republic Insurance Company.

19 Could you state your full
20 name for the record, please?

21 A. David Thomas Austern.

22 Q. Have you ever been deposed
23 before?

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1 DEPOSITION SUPPORT INDEX

2 A. Yes.

3 Q. How many times?

4 A. Somewhere between 25 and 30
times.

5 Q. So it's fair to say that you
6 are familiar with the protocol for a
7 deposition then?

8 A. I am.

9 Q. Okay. Can you give me a
10 summary of your professional background?

11 A. I was an assistant district
12 attorney in the New York County District
13 Attorney's Office for four years; I was
14 an assistant United States attorney in
15 the United States Attorney's Office in
16 Washington, D.C. for four years; I was a
17 law professor for two years; I was in the
18 private practice of law for something
19 like 12 years; and I've been general
20 counsel of the Manville Personal Injury
21 Settlement Trust, and I have had some
22 other asbestos matters for the last 21
23 and a half years. That doesn't add up to
24 45, and it should, but...

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1 **Q. Those are estimates, I take**
 2 it?

3 A. Those are estimates, yes.

4 **Q. What did you do in**
 5 **preparation for today's deposition?**

6 A. I reviewed some documents,
 7 and I spoke to counsel.

8 **Q. What documents did you**
 9 **review?**

10 A. I also reviewed some
 11 transcripts.

12 I reviewed the Personal
 13 Injury Trust Agreement; the Trust
 14 Distribution Process -- the Personal
 15 Injury Trust Distribution Process; the
 16 Transfer Agreement; the Cooperation
 17 Agreement; I reviewed Ms. Biggs' latest
 18 estimation report; Dr. Peterson's latest
 19 report; Dr. Florence's latest report;
 20 Dr. Whitehouse's -- one of
 21 Dr. Whitehouse's reports -- I am sorry --
 22 two of Dr. Whitehouse's reports; the
 23 rebuttal to those reports from Dr. Welsh
 1 and Dr. Freedman; the objections filed by

1 thing in preparation of the deposition.
 2 I listened to parts of, albeit not all,
 3 of the Lockwood deposition.

4 **Q. Did you meet with counsel in**
 5 **preparation for the deposition?**

6 A. Yes.

7 **Q. When?**

8 A. Last Friday and yesterday.

9 **Q. And for how long last**

10 **Friday? What period of time did you meet**
 11 **with counsel?**

12 A. I confess I don't remember,
 13 but it was several hours.

14 **Q. And the more recent meeting?**

15 A. I would say three hours.

16 **Q. Was it just counsel for the**
 17 **Future Claimants' Representative or were**
 18 **other Plan proponent counsel present?**

19 A. No. There were no other
 20 Plan proponent counsel.

21 **Q. In reviewing Mr. Lockwood's**
 22 **deposition testimony, was there anything**
 23 **in his transcript with which you**
 24 **disagreed?**

1 the Libby claimants and by one or more
 2 insurance companies, and I am not sure I
 3 know which ones; my prior deposition in
 4 this case; my prior deposition in the
 5 Combustion Engineering case; my testimony
 6 in the Combustion Engineering case. I
 7 may have left something out, but I think
 8 those are most of the documents I
 9 reviewed.

10 **Q. Okay. And you also**
 11 **mentioned that you had reviewed some**
 12 **transcripts?**

13 A. Those were the depositions
 14 and trial testimony -- oh, excuse me.
 15 Yes. I reviewed Mr. Lockwood's
 16 deposition.

17 **Q. Did you actually review the**
 18 **Amended Plan of Reorganization?**

19 A. Yes -- and excuse me -- and
 20 the Disclosure Statement.

21 **Q. And over what period of time**
 22 **did you review all these materials in**
 23 **preparation for your deposition?**

24 A. Two weeks. I did one other

1 A. I don't remember -- nothing
 2 occurs to me, although if you showed me a
 3 question and answer, I might say I
 4 disagreed. But I don't recall anything.

5 **Q. Okay. When you listened in**
 6 **on a portion of the deposition, was there**
 7 **anything that you heard by way of an**
 8 **answer by Mr. Lockwood that struck you as**
 9 **inaccurate?**

10 A. Not that I recall.

11 **Q. Okay. Now, you mentioned**
 12 **that you had reviewed the Disclosure**
 13 **Statement, the Plan, the PI Trust**
 14 **Agreement I assume you were referring to,**
 15 **the PI Trust Distribution Procedures, the**
 16 **Transfer Agreement, and the Cooperation**
 17 **Agreement?**

18 A. Yes.

19 **Q. Do you understand all of**
 20 **those documents?**

21 A. No.

22 **Q. Are there particular**
 23 **documents that you understand better than**
 24 **others?**

1 A. Yes.

2 Q. Which ones?

3 A. The Trust Distribution
4 Process.

5 Q. By that, you mean the
6 Asbestos PI Trust Distribution
7 Procedures?

8 A. Yes, yes.

9 Q. Okay.

10 A. I will refer to it as the
11 TDP, most likely.

12 Q. We will finish the
13 deposition a lot sooner if you do that.

14 A. And there were some sections
15 in some of the other documents I thought
16 I understood and some sections I thought
17 I did not.

18 Q. Okay. How about the Trust
19 Agreement?

20 A. I believe I understood most
21 of that.

22 Q. Okay. You were appointed by
23 the bankruptcy court as the, quote, legal
4 representative, close quote, under

1 FCR? I understand that you were approved
2 by the bankruptcy court, but how were you
3 presented, if you will, for that role?

4 A. Understanding I was not in
5 the case at the time, I can only tell you
6 what documents I have looked at appear to
7 say.

8 Q. Okay.

9 A. The Debtor presented to the
10 court a motion of seeking an appointment
11 of an FCR, provided the court with three
12 names and an untitled fourth name -- I
13 will explain that in a moment. The three
14 names proposed were me and two other
15 people, and then a statement that the
16 Property Damage Representatives didn't
17 want any of the three names mentioned by
18 the Debtor and wanted some unnamed fourth
19 person. So there were four, if you will,
20 potential choices presented to the
21 bankruptcy court.

22 Q. Who were the other two named
23 individuals?

24 A. Professor Eric Green and

1 Section 524(g) of the bankruptcy code,
2 correct?

3 A. Correct.

4 Q. When did that occur?

5 A. Just about this time of year
6 five years ago.

7 Q. Okay. So in 2004?

8 A. Yes.

9 Q. And, as I understand it,
10 under the Plan your title is the asbestos
11 PI FCR, correct?

12 A. Yes.

13 Q. And the FCR is for Future
14 Claimants' Representative?

15 A. Yes.

16 Q. You will understand if I
17 refer to you as the FCR in the
18 deposition?

19 A. I will understand what the
20 reference is.

21 Q. Okay. You are a
22 co-proponent of the Plan, correct?

23 A. Yes.

24 Q. How did you come to be the

1 Dean Trafellet.

2 Q. I gather from your answer
3 that at the time this occurred, it was
4 contemplated that there would be a single
5 asbestos trust that would handle both
6 personal injury claims and property
7 damage claims?

8 A. I don't know.

9 Q. Do you have any idea how the
10 Debtors came up with the three names that
11 they did?

12 A. I know what they said in
13 their pleading. They said they had
14 discussed this matter with, well,
15 obviously, the Property Damage Trust
16 Representatives that I mentioned, and
17 they had discussed it with one or more
18 Creditors Committees and the Asbestos
19 Claimants Committee.

20 Q. And then did the bankruptcy
21 court select you from the list of
22 contenders for the position?

23 A. Well, I have left out a
24 pleading.

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Page 24

1 **Q. Okay.**

2 A. The Asbestos Claimants
3 Committee filed a motion, I guess, in
4 response to the Debtors motion in which
5 they -- I should back up a step.

6 The Debtors motion had a
7 chart on it, as I recall, which showed
8 who opposed various of the names
9 mentioned and who was in favor of various
10 of the names mentioned, looking at the
11 committees. And one of the things that
12 was said was that the ACC opposed me and
13 wanted Dean Trafelet. The ACC responded
14 to that, I believe, saying they did not
15 oppose me, but they wanted Dean Trafelet
16 rather than me.

17 **Q. Okay. And did judge**
18 **Fitzgerald then make a decision based**
19 **upon the pleadings you just described?**

20 A. I don't know what drove her
21 decision, but she made a decision and she
22 selected me.

23 **Q. Okay. Now, did you have the**
4 **title FCR with respect to other asbestos**

1 A. So I certainly don't have
2 that role. I advise the trustees -- I am
3 the legal advisor to the trustees and
4 sometimes trust staff.

5 **Q. And what is your role as the**
6 **FCR for the Combustion Engineering Trust?**

7 A. I represent future
8 claimants.

9 **Q. Are you familiar with a term**
10 **"Trust Advisory Committee"?**

11 A. Yes.

12 **Q. Is there a Trust Advisory**
13 **Committee for the Combustion Engineering**
14 **Trust?**

15 A. Yes.

16 **Q. And who are its current**
17 **members?**

18 A. Mr. Cooney, Mr. Weitz,
19 Mr. Kazan, and there is somebody else.
20 And I am not sure who it is.

21 **Q. With respect to the**
22 **Combustion Engineering Trust, did you**
23 **have the role of future claimants -- let**
24 **me back up. Strike that.**

Page 23

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1 **trusts?**

2 A. Yes.

3 **Q. Which ones? Actually, just**
4 **for purposes of that question, I want to**
5 **focus on trusts that are obviously up and**
6 **running as opposed to ones that may be in**
7 **the works.**

8 A. One other trust, the
9 Combustion Engineering Trust.

10 **Q. And then you mentioned**
11 **earlier that you are the general counsel**
12 **for the Manville Trust?**

13 A. Yes.

14 **Q. Is your role as the general**
15 **counsel for the Manville Trust akin to**
16 **your role as the FCR for the Combustion**
17 **Engineering Trust?**

18 A. No.

19 **Q. Okay. Can you describe the**
20 **differences in your roles?**

21 A. Well, first of all, the
22 Manville Trust has a Futures Claims
23 Representative.

24 **Q. Okay.**

1 **Did you have the role of**
2 **legal representative, as that term is**
3 **used in Section 524(g) of the bankruptcy**
4 **code?**

5 A. I believe that was what I
6 was, yes.

7 **Q. Okay. And were you a**
8 **co-proponent of the CE Trust --**

9 A. Yes.

10 **Q. The CE Plan?**

11 A. Yes.

12 **Q. Putting aside confirmed**
13 **plans and trusts that are up and running,**
14 **are you the designated Future Claimants'**
15 **Representative in connection with any**
16 **pending asbestos bankruptcy cases other**
17 **than the Grace case?**

18 A. No.

19 **Q. Are you familiar with the**
20 **statutory requirements for a Section**
21 **524(g) trust?**

22 A. I am generally familiar. I
23 am not sure I can recall each and every
24 one right at the moment.

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1 Q. You have read Section
2 524(g)?

3 A. I have.

4 Q. How many times?

5 A. Countless times.

6 Q. Okay. That's what I thought
7 you would say.

8 Did you play any role in the
9 drafting or enactment of Section 524(g)?

10 A. I met with some legislators
11 and the staff of some legislators at the
12 time it was being proposed.

13 Q. And who were they?

14 A. Senator Heflin, one of
15 Senator Heflin's legislative assistants,
16 counsel to Senator Kennedy. There were
17 some other staff members of some other
18 senators that I met with. I am not sure
19 I can recall them.

20 Q. Besides meeting with them,
21 did you have any input in the provisions
22 that appear in Section 524(g)?

23 A. I am not sure I know what
1 you mean by input. I attended --

1 protection in addition to whatever
2 Section 105 gave us.

3 Q. And what was your rationale
4 or your response?

5 A. First of all, we couldn't
6 sell the stock because people,
7 prospective purchasers were worried about
8 Section 105 protection, and that came out
9 again and again in attempts to sell the
10 stock. I can't think of any other way of
11 putting it.

12 Q. Okay. Other than what you
13 have just described, did you have any
14 other input with respect to Section
15 524(g)'s enactment?

16 A. No.

17 Q. All right. In this case,
18 there are actually two Future Claimants'
19 Representatives, correct?

20 A. Yes.

21 Q. There is the PI FCR and
22 there is the PD FCR?

23 A. Yes.

24 Q. I want to focus on your role

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Page 29

1 Q. Let me back up.

2 Did you comment on any
3 drafts? Did you provide suggestions as
4 to what the legislation should involve in
5 terms of requirements for 524(g) trust?

6 A. No.

7 Q. Okay. What was the nature
8 of your input then?

9 A. I was asked to come answer
10 questions that they had about the
11 necessity for 524(g).

12 Q. Okay. And what, if you
13 recall, did they specifically ask you?

14 A. Well, the Manville Trust, of
15 course, did not have the benefits of a
16 524(g) injunction, and it frustrated
17 somewhat dramatically our ability to sell
18 our Manville stock, which was a very
19 large percentage of the assets of the
20 Trust. And they wanted to know why --
21 because there was another injunction
22 under Section 105. They wanted to know
23 why I thought it would be easier to sell
24 the Manville stock if we had 524(g)

1 as the PI FCR, obviously, and what I
2 would like you to do first is to identify
3 for me the members of the Asbestos PI
4 Trust Advisory Committee in this case.

5 A. Well, the members --

6 Q. The proposed members, I
7 should say.

8 A. The members are actually, as
9 I understand it, individual claimants,
10 but they are represented by certain
11 lawyers, who I guess you would say appear
12 on their behalf. And they are Mr. Budd,
13 Mr. Cooney, Mr. Weitz, and Mr. Rice.

14 MR. BROWN: Okay. Could you
15 read my last question?

16 (The reporter read from the
17 record as requested.)

18 MR. BROWN: Let me back up.
19 You might have misunderstood my
20 question, Mr. Austern.

21 BY MR. BROWN:

22 Q. I was asking about the Trust
23 Advisory Committee as opposed to the
24 asbestos PI Committee. But let's start

1 MR. BROWN: I couched it as
2 does he have an understanding.
3

4 THE WITNESS: I don't know.
5

6 BY MR. BROWN:
7

8 **Q. Do you have an understanding**
9 **as to whether Section 524(g) of the**
10 **bankruptcy code requires someone with the**
11 **title Future Claimants' Representative**
12 **after a Plan of Reorganization has been**
13 **confirmed and gone effective?**

14 MR. GUY: Same objection.
15

16 THE WITNESS: I believe it
17 does.
18

19 BY MR. BROWN:
20

21 **Q. And what is the basis for**
22 **your belief?**

23 A. Well, my belief is based on
24 Fibreboard and the decision in Fibreboard
1 by the Supreme Court. And I don't
2 remember if I am confusing that with
3 actually what got into the language of
4 524(g). But the Supreme Court found
5 something of a conflict between present
6 claimants and future claimants, or at

1 **asbestos trust that is up and running**
2 **that has a two-trust structure, one trust**
3 **involving PI claims and the other**
4 **involving PD claims?**

5 A. The answer to the first part
6 of your question would be yes, but not
7 because of that division.

8 **Q. Okay. What's the division?**

9 A. Well, I believe that -- I
10 believe what I refer to as the
11 Halliburton Trust has a number of
12 sub-trusts for dispute claims but not the
13 differentiation as between property
14 damage and otherwise.

15 **Q. When you say sub-trust, do**
16 **you mean by that sub-funds within a**
17 **single trust?**

18 A. Yes.

19 **Q. Okay. As opposed to two**
20 **distinct trusts?**

21 A. Yes.

22 MR. COHN: Michael, I think
23 he's referring to silica trust.

24 BY MR. BROWN:

1 least potential conflicts, and there was
2 a Future Claims Representative or
3 essentially a requirement in that case.
4 And I think it was transferred into
5 524(g).

6 **Q. If I showed you the language**
7 **of 524(g), would you be able to tell me**
8 **where that is set forth?**

9 A. If it's not there, I
10 wouldn't.

11 **Q. You are not sure whether**
12 **it's there?**

13 A. That's right.

14 **Q. Okay. The Joint Plan in**
15 **this case has two trusts, correct?**

16 A. Yes.

17 **Q. It has an Asbestos PI Trust,**
18 **and it has an Asbestos PD Trust. Why?**

19 A. Well, that's the way the
20 Plan proponents have done it. My view of
21 this is that property damage claimants
22 are different than personal injury
23 claimants.

24 **Q. Are you aware of any other**

1 **Q. You mentioned the PD claims**
2 **and PI claims are different. They are**
3 **actually treated differently under this**
4 **Joint Plan; are they not?**

5 A. Yes.

6 **Q. Can you describe the**
7 **difference between asbestos PI claims and**
8 **asbestos PD claims under the Joint Plan?**

9 A. I can describe the treatment
10 of personal injury claims; I cannot
11 describe the treatment of property damage
12 claims.

13 **Q. Can you describe the**
14 **differences?**

15 A. No, because I can't...

16 **Q. Do you know whether Section**
17 **524(g) addresses the propriety of a**
18 **two-trust structure of bankruptcy?**

19 A. I do not.

20 **Q. Are you familiar with the**
21 **distinction between the term "demand" as**
22 **it's used in 524(g) and "claim" as it's**
23 **used in the bankruptcy code?**

24 A. No.

1 **Q. Do you have any
2 understanding at all of what a demand is?**

3 A. In bankruptcy law, no.

4 **Q. Who do you understand to be
5 your constituency?**

6 A. Future claimants.

7 **Q. Do you have an understanding
8 that future claimants are the holders of
9 future demands?**

10 A. I don't know.

11 **Q. Do you have an understanding
12 as to whether the Debtors face the
13 prospect of any future asbestos PD
14 demands or asbestos PD claims?**

15 A. I believe there are
16 scenarios in which they do.

17 **Q. Could you describe them?**

18 A. No, but I believe that there
19 are property damage claims that -- that
20 the Debtor is responsible
21 post-confirmation for certain property
22 damage claims.

23 **Q. And that those property
1 damage claims would fit within what you**

1 **today, for which you -- strike that.**

2 **Are there particular
3 provisions in the Plan that you don't
4 understand?**

5 A. Yes.

6 **Q. Are there any that stick out
7 in your mind in that regard?**

8 A. Can I look at the Plan for a
9 moment?

10 **Q. Sure.**

11 A. By way of example, 7.15 of
12 the document.

13 **Q. That's one that you do not
14 understand?**

15 A. Well, it's one I have
16 trouble trying to understand.

17 **Q. You are in good company.**

18 A. There are other sections of
19 the Plan and other documents I reviewed
20 that address insurance issues, which I
21 have trouble understanding and rely on
22 counsel to explain to me.

23 **Q. Well, as would have it, 7.15
24 is an area that I wanted to question you**

1 **understand to be a future property damage
2 claim as opposed to a current property
3 damage claim?**

4 A. I am not sure.

5 **Q. All right.**

6 MR. BROWN: We will mark
7 this Austern-3.

8 (Austern-3 marked for
9 identification at this time.)

10 BY MR. BROWN:

11 **Q. Mr. Austern, you have before
12 you a document that we have marked
13 Austern-3.**

14 **My first question is, can
15 you identify it?**

16 A. It's the first Amended Joint
17 Plan of Reorganization.

18 **Q. And this is one of the
19 documents you indicated previously that
20 you reviewed in preparation for this
deposition, correct?**

21 A. Yes.

22 **Q. Are there particular
23 provisions in the Plan, as you sit here**

1 **about. So why don't we turn to that
2 section.**

3 A. (Witness complies with
4 request.)

5 **Q. And why don't you take a
6 moment to review it. It's not terribly
7 long.**

8 MR. GUY: Is there any
9 particular section, Michael?

10 MR. BROWN: Well, I have
11 questions about a few sections, so
12 it might be easiest if he reads
13 the whole thing.

14 THE WITNESS: Okay. I have
15 reviewed it.

16 BY MR. BROWN:

17 **Q. Okay. Recognizing that you
18 don't understand it fully, do you have an
19 idea of what its intended purpose is?**

20 A. Its intended purpose, as I
21 understand it, is to create insurance
22 neutrality.

23 **Q. And what do you understand
24 insurance neutrality to be?**

1 A. That the Plan does not
 2 interfere with the rights of the
 3 insurance companies.

4 **Q. Okay. Are there any
 5 exceptions to that broad statement, as
 6 you understand Section 7.15?**

7 MR. COHN: You might want to
 8 rephrase that because you just
 9 changed from his understanding of
 10 insurance neutrality in the broad
 11 concept to a provision that very
 12 clearly is not what it was
 13 announced to be.

14 MR. BROWN: Can you read the
 15 last question?

16 (The reporter read from the
 17 record as requested.)

18 BY MR. BROWN:

19 **Q. You understand Section 7.15
 20 to be intended to preserve the insurers'
 21 rights; is that a fair statement?**

22 A. Yes.

23 **Q. Okay. Is it your belief
 1 that that's what it accomplishes?**

1 MR. GUY: Objection.
 2 MR. LIESEMER: Object to the
 3 form of the question.

4 MR. GUY: It calls for a
 5 legal conclusion. The witness is
 6 a fact witness.

7 MS. BAER: Same objection.

8 THE WITNESS: I am not
 9 positive I know what you mean by
 10 preemptory. You sort of focused
 11 on my problem with 7.15. I don't
 12 know how you read the successive
 13 paragraphs as impacting on each
 14 other.

15 BY MR. BROWN:

16 **Q. Do you believe Section 7.15
 17 to be unclear?**

18 A. To me.

19 MR. GUY: Objection.

20 BY MR. BROWN:

21 **Q. Okay. Well, let's explore
 22 that a little bit.**

23 Let's look at Section
 24 7.15(b), and you will see that there is a

1 A. I don't know.

2 (There was a discussion held
 3 off the record at this time.)

4 BY MR. BROWN:

5 **Q. Mr. Austern, are you
 6 familiar with the UNR decision in the
 7 Seventh Circuit, the citation to which is
 8 942 F.2d 1101?**

9 A. I am familiar with the UNR
 10 Trust. I am not familiar with the
 11 decision.

12 **Q. Are you familiar with what
 13 happened in the trial court in the
 14 Fuller-Austin coverage case?**

15 MR. GUY: Objection, vague.

16 THE WITNESS: No.

17 BY MR. BROWN:

18 **Q. You said you just read
 19 Section 7.15. Let's focus on (a).
 20 Is your understanding that
 21 (a) is a preemptory provision with
 22 respect to the Plan, Plan documents, and
 23 Confirmation Order except as specifically
 24 set forth in Section 7.15?**

1 reference in subsection (b) to, quote,
 2 the beneficiaries of the Asbestos PI
 3 Trust?

4 **Do you see that?**

5 A. Yes.

6 **Q. Do you have any
 7 understanding as to what that means?**

8 A. It means what it states, the
 9 beneficiaries of the Personal Injury
 10 Trust.

11 **Q. And who are they?**

12 A. Well, there are personal
 13 injury claimants obviously, and there
 14 are, under certain circumstances,
 15 indirect personal injury claimants.

16 **Q. Okay. And who do you
 17 understand to be within the definition of
 18 indirect PI Trust claimants?**

19 A. Entities that can bring
 20 claims as indirect claimants on the
 21 grounds that they have paid dollars that
 22 the Personal Injury Trust should
 23 reimburse them for.

24 **Q. Okay. Are you familiar at**

1 all with any of the Debtors' pre-petition
2 settlements with insurance companies?

3 A. I have seen a list, and
4 that's the extent of my knowledge.

5 Q. Are you aware that at least
6 certain of those insurers have
7 contractual indemnity provisions against
8 the Debtors in those settlement
9 agreements?

10 A. Can you explain to me what
11 you mean by contractual?

12 Q. Sure. I will represent to
13 you that there are settlement agreements
14 that are pre-petition settlement
15 agreements in which the insurer paid a
16 sum of money to the Debtors, and in
17 exchange for paying that money, the
18 Debtors agreed to indemnify the insurer
19 in the event that claims were asserted
20 against the policy after the settlement
21 by other parties.

22 A. Third party claimants?

23 Q. Third parties.

1 Do you understand the term

1 BY MR. BROWN:

2 Q. Okay. Let me parse that
3 out. Do you understand certain of the
4 Debtors' insurance companies to have
5 indirect asbestos PI claims?

6 A. They could. They could have
7 the right to file them, yes.

8 Q. Okay. And do you understand
9 those insurers to fit within the phrase
10 in (b), the beneficiaries of the Asbestos
11 PI Trust? In other words, are the
12 insurers that have the contractual
13 indemnity claims against the Debtors,
14 quote, beneficiaries of the Asbestos PI
15 Trust, as that term is used in 7.15(b)?

16 MR. LIESEMER: Object to the
17 form of the question.

18 MR. GUY: Objection, asked
19 and answered, compound.

20 MS. BAER: Same objection.

21 MR. GUY: You may answer.

22 THE WITNESS: As far as I
23 know, they could be under certain
24 circumstances.

1 "indirect PI Trust claims" to include the
2 insurers insofar as they have the type of
3 contractual indemnity claim that I just
4 described?

5 MR. LIESEMER: Object to the
6 form of the question.

7 MR. GUY: Same objection.

8 THE WITNESS: Mr. Brown, I
9 understand that all asbestos
10 personal injury insurance has been
11 channelled to the Asbestos
12 Personal Injury Trust. And there
13 are settled insurance companies
14 that -- how would I describe it --
15 their obligations have been
16 settled with the Debtor; there are
17 unsettled ones; and then there are
18 those that have coverage in place
19 agreements or reimbursement
20 agreements.

21 I don't know where your
22 question fits into my
23 understanding of those buckets of
24 insurance entities.

1 BY MR. BROWN:

2 Q. All right. Then I would now
3 like you to compare the language in (a)
4 and the language in (b) based on the
5 assumption that they are.

6 MR. GUY: Now I am confused.

7 MR. BROWN: Anyone who reads
8 this provision is confused.

9 MR. GUY: I am confused.

10 It's talking --

11 THE WITNESS: You are asking
12 me to compare (a) to (b) or (b) to
13 (a)?

14 MR. GUY: For what purpose?

15 BY MR. BROWN:

16 Q. If the insurer that I just
17 described is a beneficiary of the
18 Asbestos PI Trust, then, according to
19 (b), it is bound by the Plan, the Plan
20 documents, and the Confirmation Order,
21 correct?

22 A. That's what (b) says, yes.

23 Q. So does (b) then supersede
24 subsection (a)?

1 A. I don't know.

2 Q. Let's go to a defined term
3 in the Plan which appears on page 6,
4 number 16, quote, asbestos insurer
5 coverage defenses. Take a moment to
6 review that provision.

7 MR. GUY: So that I don't
8 have to repeat it throughout, I am
9 going to enter a standing
10 objection. The witness is here
11 not as a 30(b)(6) witness on
12 insurer issues, and the Plan says
13 what it says.

14 MR. BROWN: I understand.

15 MR. COHN: Can you keep your
16 voice up, Tom?

17 MR. GUY: We will go off the
18 record.

19 (There was a discussion held
20 off the record at this time.)

21 BY MR. BROWN:

22 Q. Have you had a chance to
23 review the definition of asbestos insurer
4 coverage defenses?

1 Q. Okay. My question is, do
2 you have an understanding as to whether
3 the language in 7.15(a) supersedes the
4 language in 11.9?

5 A. I don't know.

6 Q. Do you know whether it's
7 intended to?

8 A. No.

9 Q. Reading both of those
10 provisions, do you understand whether it
11 does?

12 MR. GUY: Objection, calls
13 for a legal conclusion.

14 MR. BROWN: It just calls
15 for his understanding.

16 THE WITNESS: Mr. Brown, I
17 must confess to you when I read
18 11.9 both the first time and the
19 second time, what I concentrated
20 on was on the fact that I had
21 exculpation, and I didn't
22 concentrate very much more.

23 BY MR. BROWN:

24 Q. So you have been exculpated

1 A. Yes.

2 Q. Do you understand it?

3 A. No.

4 Q. Fair enough. You are not
5 alone.

6 Let's get back to 7.15.

7 A. Can you give me the page
8 again?
9 Q. I am sorry. It's page 87.
10 Actually, what I would like to do is I
11 want to do a comparison. Can you also
12 look at Section 11.9? You might want to
13 take a moment to read 11.9.

14 A. Can you give me a page
15 number?

16 Q. Yes. Page 115, Section 11.9
17 entitled Exculpation.

18 A. Okay.

19 Q. If you keep that page handy
20 and go back and look at Section 7.15, I
21 will represent to you, feel free to look
22 yourself, that there is no specific
23 reference in 7.15 to Section 11.9.

24 A. I believe that's correct.

1 if the Plan is confirmed?

2 A. Yes.

3 Q. Let's just use that as an
4 example, not to pick on you, but since
5 you understand at least that much in
6 11.9.

7 Insofar as an insurer had a
8 claim against you, would you still be
9 exculpated in light of Section 7.15 as
10 you understand it?

11 MR. LIESEMER: Object to the
12 form of the question.

13 MR. GUY: Objection, calls
14 for a legal conclusion.

15 THE WITNESS: The first part
16 of the answer is that in the Trust
17 Agreement, I also have what is not
18 labeled as exculpation but
19 indemnification rights, not
20 including gross negligence.

21 The answer is I don't know
22 the answer to that question.

23 BY MR. BROWN:

24 Q. Does that concern you?

1 A. Does a possible conflict of
2 7.15 to 11.9 concern me?

3 Q. Well, yes.

4 A. No.

5 Q. Okay. Would you go back to
6 Section 7.7 of the Plan?

7 A. Did you say 7.7?

8 Q. Yes. 7.7 entitled

9 Conditions to Occurrence of the
10 Confirmation Date.

11 MR. GUY: What page is that?

12 MR. BROWN: I am sorry. It
13 starts on page 69, and there are a
14 lot of conditions. So it runs to
15 page 81.

16 THE WITNESS: Okay.

17 BY MR. BROWN:

18 Q. You are free to look at
19 that, if you want, but I understand you
20 have already reviewed the Plan.

21 A. Yes.

22 Q. My question is, do you have
23 an understanding as to whether Section
4 7.15 entitled Insurance Neutrality

1 MR. GUY: Objection.

2 MR. LIESEMER: I join in
3 that objection.

4 MR. GUY: It calls for a
5 legal conclusion.

6 THE WITNESS: I don't know.

7 BY MR. BROWN:

8 Q. Okay. Can you now look at
9 7.15(h)?

10 A. Did you say (e)?

11 Q. (H). It appears on page 88.

12 A. Yes.

13 Q. Do you understand 7.15(h) to
14 bind all of the Debtors' insurers to all
15 of the releases and injunctions set forth
16 in the Plan?

17 MR. GUY: Objection, calls
18 for a legal conclusion.

19 THE WITNESS: I don't know.

20 BY MR. BROWN:

21 Q. Let's go to page 97 of the
22 Plan, Section 8.5 entitled Successor
23 Claims Injunction.

24 MR. GUY: When you get to a

1 preempts Section 7.7 insofar as the
2 Debtors's insurers are concerned?

3 MR. GUY: Objection, calls
4 for a legal conclusion.

5 THE WITNESS: I don't know.

6 BY MR. BROWN:

7 Q. Okay. If you look at
8 Section 7.8, which begins on page 81,
9 that one is entitled Conditions to
10 Occurrence of the Effective Date.

11 If I asked you the same
12 question, would your answer be the same
13 with respect to Section 7.8?

14 A. Can I look at 7.8 for a
15 moment?

16 Q. Sure.

17 A. I am sorry. Could you
18 repeat the question?

19 Q. Let me see if I can rephrase
20 it. My question is whether the
21 preemptory language that appears in
22 Section 7.15(a) preempts the conditions
23 set forth in Section 7.8, as understand
24 it?

1 point for a break, can we take
2 one?

3 MR. BROWN: Why don't we do
4 that right now.

5 (There was a break from
6 11:03 a.m. to 11:13 a.m.)

7 (The reporter read from the
8 record as requested.)

9 BY MR. BROWN:

10 Q. Mr. Austern, I don't know if
11 you have had a chance to review that
12 section during the break, but if not, can
13 you take a look at it?

14 A. Yes, I have reviewed this.

15 Q. Do you have an understanding
16 as to the purpose of the successor claims
17 injunction?

18 MR. LIESEMER: Object to the
19 form of the question.

20 THE WITNESS: Well, as its
21 name implies, it is intended to
22 enjoin certain conduct. Beyond
23 that, I, of course, was not part
24 of this case when either the

1 Sealed Air or the Fresenius
2 actions were commenced and
3 concluded and settled.

4 BY MR. BROWN:

5 **Q. Do you understand the**
6 **Fresenius indemnified parties and the**
7 **Sealed Air indemnified parties to be the**
8 **beneficiaries of the successor claims**
9 **injunction?**

10 A. I believe they are.

11 **Q. Okay. The successor claims**
12 **injunction is a 105 injunction, correct?**

13 A. Correct. It's not a 524(g)
14 injunction.

15 **Q. I gather from your answer**
16 **that you understand the difference**
17 **between a Section 105 injunction and a**
18 **Section 524(g) injunction?**

19 A. To the extent that Manville
20 had only a Section 105 injunction, yes.

21 **Q. Okay. Do you have an**
22 **understanding as to whether the successor**
23 **claims injunction enjoins any claims that**
4 **are asbestos-related claims?**

1 **Q. The successor claims**
2 **injunction by its terms cannot be lifted?**
3 A. It cannot, as I understand
4 it.

5 **Q. If a claim fits within the**
6 **definition of the successor claim, as**
7 **that term is defined in the Plan, do you**
8 **understand the successor claims**
9 **injunction to enjoin that claim?**

10 MR. LIESEMER: Object to the
11 form of the question.

12 MR. GUY: Same objection.

13 MS. BAER: Same objection.

14 THE WITNESS: I don't know.

15 BY MR. BROWN:

16 **Q. Let's turn back for a moment**
17 **to asbestos PI channelling injunction,**
18 **page 90, Section 8.2.**

19 A. Okay.

20 **Q. Do you understand the**
21 **asbestos PI channelling injunction to be**
22 **purely a 524(g) injunction?**

23 MR. GUY: Objection.

24 THE WITNESS: I don't know.

1 MR. GUY: Objection, calls
2 for a legal conclusion.

3 THE WITNESS: Do you mean
4 asbestos personal injury, or no?

5 BY MR. BROWN:

6 **Q. Could be, or any other type**
7 **of asbestos-related claim.**

8 A. I am not sure.

9 **Q. Do you understand there to**
10 **be a problem with using a Section 105**
11 **injunction to enjoin asbestos-related**
12 **claims?**

13 MR. GUY: Objection, vague
14 as to problem.

15 MR. LIESEMER: I join in the
16 objection.

17 THE WITNESS: There are
18 certain 105 injunctions that can
19 be lifted. I assume you cannot do
20 that with a 524(g) injunction as
21 it is inexorably intertwined with
22 the Plan itself. I don't know of
23 any other distinctions.

24 BY MR. BROWN:

1 I don't know if it is or not.

2 BY MR. BROWN:

3 **Q. All right. Mr. Austern, I**
4 **want to shift gears here and turn back to**
5 **the Asbestos PI Trust Agreement, which we**
6 **marked as Austern-2. And I would like to**
7 **direct your attention to Section 6.1.**
8 **And you are going to want a page.**

9 A. It's 34.

10 **Q. In 6.1, the second sentence**
11 **says, "He shall serve in a fiduciary**
12 **capacity, representing the interests of**
13 **the holders of future PI Trust Claims for**
14 **the purpose of protecting the rights of**
15 **such persons."**

16 **Do you see that?**

17 A. Yes.

18 **Q. And the "he" there is you,**
19 **correct?**

20 A. Yes.

21 **Q. What do you understand your**
22 **obligations to be to the holders of**
23 **future PI Trust claims?**

24 A. I represent them, and, as to

Page 70

Page 72

1 form of the question.

2 THE WITNESS: Well, I don't
3 think 6.1 says "all," but I will
4 accept the way you phrased it.

5 BY MR. BROWN:

6 Q. Okay.

7 A. I can't think of any
8 difference, as I sit here now, in terms
9 of -- it's a different population, but
10 other than that, I can't I can't think of
11 any difference.

12 Q. You rightly noted that the
13 word "all" does not appear in 6.1.

14 Is there any particular
15 reason for that?

16 A. Not that I know of.

17 Q. Let me ask you a more
18 general question. What is the purpose of
19 the TAC?

20 MR. LIESEMER: Object to the
21 form of the question.

22 THE WITNESS: To advise the
23 trustees with respect to present
4 claimants and the operation of the

1 MS. ALCABES: Page 10.

2 THE WITNESS: Yes.

3 BY MR. BROWN:

4 Q. Why don't you tell me what
5 the general purpose of the consultation
6 provisions is for? Well, it's actually
7 for the TAC and for the Futures'
8 Representative.

9 A. There are a lot of decisions
10 trustees have to make. This is
11 consultation, not carving out consent for
12 a moment, in terms of investments, in
13 terms of selecting vendors, in terms of
14 things that are not in the Trust
15 Distribution Process, and that
16 consultation is described in (e).

17 Q. Okay. You mentioned in your
18 answer the consent provisions.

19 A. There are consent
20 provisions.

21 Q. And those appear in (f),
22 correct, on page 11?

23 A. Yes.

24 Q. What is the rationale for

Page 71

Page 73

1 Trust.

2 BY MR. BROWN:

3 Q. And what do you mean by
4 advise?

5 A. Well, present their views to
6 the trustees and under some
7 circumstances, in the Trust Agreement,
8 either give or do not give their consent
9 to certain trustee action.

10 Q. Is there a reason why the
11 TAC members are personal injury asbestos
12 lawyers?

13 A. I can give you my personal
14 view.

15 Q. Okay.

16 A. They represent the
17 beneficiaries of the Trust, and I don't
18 know who else you would appoint.

19 Q. You are familiar, are you
20 not, with the consultation provisions
1 that appear in Section 2.2(e) of the
22 Trust Agreement, correct?

23 MR. GUY: What page?

24 MR. BROWN: Page 10.

1 the consent provisions that appear in the
2 Trust Agreement?

3 A. As distinguished from
4 consultation?

5 Q. Or as distinguished from not
6 having them at all?

7 A. As I understand it, there
8 are certain decisions that trustees make
9 that are so important, they can only be
10 made with the consent of both the TAC and
11 the Future Claims Representative.

12 Q. And that was a negotiated
13 term of the overall Plan, correct?

14 A. Well, it's been negotiated a
15 lot before, and I am not sure if any
16 specific provision was negotiated in this
17 Plan.

18 Q. Why can't the trustees make
19 these decisions on their own?

20 MR. GUY: Objection as to
21 "these decisions."

22 MR. BROWN: Well, let's back
23 up.

24 BY MR. BROWN:

1 **Q.** You will agree with me that
 2 Section 2.2(f) sets forth a number of
 3 different items for which the trustees
 4 need the consent of the TAC and the
 5 Future Claimants' Representative,
 6 correct?

7 A. Yes.

8 **Q.** It goes on from Romanette 1
 9 to Romanette 15, correct?

10 A. Yes.

11 **Q.** Why is there a need to have
 12 the consent of the Future Claimants'
 13 Representative and the TAC on these
 14 particular items rather than simply
 15 consultation?

16 A. My answer is the same, and I
 17 will speak forgetting the TAC, as the
 18 Future Claimants' Representative, I want
 19 the right to under certain circumstances
 20 not agree to a decision by the trustees
 21 and have that be the end of the decision.

22 **Q.** Well, it's not actually the
 23 end of the decision, is it?

4 A. No. There are ways of

1 list of them.

2 A. Dean Trafelet, Lewis
 3 Sifford, and Harry Huge.

4 **Q.** And do you know each of
 5 those gentlemen?

6 A. Well, in the case of
 7 Mr. Huge and Mr. Trafelet, I do know
 8 them. In the case of Mr. Sifford, I have
 9 met him on a number of occasions.

10 **Q.** Okay. What is the
 11 professional background of Mr. Huge?

12 A. Let's see. I first met him
 13 about 40 years ago at the Justice
 14 Department. I am sorry. He is a lawyer.
 15 He has been with the government. He has
 16 been in private practice. Do you want
 17 more?

18 **Q.** Does he have experience with
 19 asbestos trusts?

20 A. Yes, he does.

21 **Q.** What is that experience?

22 A. He is a trustee of Armstrong
 23 and I believe a trustee of OCF.

24 **Q.** How long has he had the role

1 resolving that difference.

2 **Q.** And what are those?

3 A. Well, I may confuse this
 4 with the Manville Trust, but you can
 5 seek, shall we say, guidance from the
 6 bankruptcy court.

7 **Q.** By that, you mean a ruling?

8 A. Yes, yes.

9 **Q.** If your consent has been
 10 unreasonably withheld in the views of the
 11 trustees?

12 A. That's correct.

13 **Q.** Is there anything in Section
 14 524(g) to your knowledge that requires a
 15 Trust, an asbestos Trust, to have a
 16 consultation and consent provisions that
 17 are set forth in this Trust Agreement?

18 A. I do not know of anything in
 19 524(g) like that.

20 **Q.** Do you know who the
 21 designated trustees are for the Asbestos
 22 PI Trust?

23 A. Yes.

24 **Q.** Okay. Who are they? Or

1 of trustee in Armstrong?

2 A. I met with him shortly after
 3 he was appointed, and I should be able to
 4 remember that. I think four or five
 5 years.

6 **Q.** And how about as a trustee
 7 in OCF?

8 A. I don't know.

9 **Q.** Okay. Why don't you tell me
 10 what the professional background of
 11 Mr. Sifford is?

12 A. I know him less well.
 13 Mr. Sifford is a practicing lawyer in a
 14 law firm, and he is an Armstrong trustee,
 15 I believe. And that's, I believe, the
 16 first time I met him, and thus I looked
 17 him up. And according to
 18 Martindale-Hubbell, he does both personal
 19 injury plaintiff's work and personal
 20 injury defense work. I am getting close
 21 to exhausting my knowledge of him.

22 **Q.** Okay. Is the personal
 23 injury work that he does, both defense
 24 and plaintiff's work, asbestos-related?

1 A. It is not as far as I know.
 2

3 **Q. Do you know what it does**
 4 **relate to?**

5 A. No.
 6

7 **Q. Okay. Do you know how long**
 8 **he has been a trustee of the Armstrong**
 9 **Trust?**

10 A. The same period of time
 11 Mr. Huge has been, but I don't remember
 12 when that started.

13 **Q. I thought you said that one**
 14 **was four to five years ago?**

15 A. Four to five years ago. I
 16 don't remember exactly.

17 **Q. All right. And what is the**
 18 **professional background of Mr. Trafelet?**

19 A. Before I get to that, let me
 20 explain. Armstrong was confirmed, and
 21 for a long time, there was no activity
 22 for reasons that allude me. So I can't
 23 remember exactly when I got involved in
 talking to those people.

24 **Q. Okay.**

1 A. Mr. Trafelet is a lawyer who

1 **Q. And would I be correct that**
 2 **he's been that for four or five years?**

3 A. Yes.

4 **Q. Let's go to Section 4.9 of**
 5 **the Trust Agreement. Take a moment to**
 6 **read that, if you would.**

7 A. Okay.

8 **Q. The second-to-the-last**
 9 **sentence in Section 4.9 says, "No Trustee**
 10 **shall act as an attorney for any person**
 11 **who holds an asbestos claim."**

12 **Do you see that?**

13 A. Yes.

14 **Q. What's the reason for that?**

15 A. To avoid conflicts.

16 **Q. What type of conflicts?**

17 A. Well, you are a trustee of a
 18 Plan paying somebody; you shouldn't be
 19 paying your client.

20 **Q. Is there any other reason?**

21 A. Not that I know of.

22 MR. BROWN: Mark this as

23 Austern-4.

24 (Austern-4 marked for

1 was a judge of, I believe, the Circuit
 2 Court in Cook County, Illinois for a
 3 period of time, and he is an asbestos
 4 trustee of -- it seems to me, he is the
 5 sole trustee of the Loomis Trust and also
 6 a Futures Rep, I believe, at Armstrong.

7 **Q. Okay. And he was one of the**
 8 **gentlemen that you mentioned that, if I**
 9 **remember correctly, the Asbestos PI**
 10 **Committee, otherwise known as the ACC,**
 11 **wanted to have the role that you have?**

12 A. Yes.

13 **Q. Do you know how long he has**
 14 **been a trustee of the Loomis Trust?**

15 A. Since it was confirmed. And
 16 this I really should know, but I think it
 17 was confirmed about three years ago.

18 **Q. Okay. And do you know**
 19 **whether he was the FCR in Armstrong**
 20 **before a plan was confirmed?**

1 A. I do not know.

2 **Q. Okay. But he is the FCR for**
 3 **the Trust?**

4 A. Yes, I believe he is.

1 identification at this time.)

2 BY MR. BROWN:

3 **Q. Exhibit-4, Mr. Austern, is**
 4 **Exhibit 6 to the Exhibit Book. My first**
 5 **question for you is, can you identify it?**

6 A. It's the Asbestos Insurance
 7 Transfer Agreement, which is part of the
 8 Plan, as you point out.

9 **Q. And I believe you said this**
 10 **is one of the documents that you had**
 11 **reviewed; am I correct?**

12 A. Yes.

13 **Q. Do you understand this**
 14 **agreement?**

15 A. Not in its entirety.

16 **Q. Okay. Are there particular**
 17 **provisions of this agreement that you do**
 18 **not understand that you could direct my**
 19 **attention to?**

20 A. Well, I would have to look
 21 at it for a moment. I am not sure I
 22 understand all of the representations and
 23 warranties and some of the terms in them.
 24 There are two schedules, if I remember

1 correctly, here.

2 **Q. I think there is three.**

3 A. All right. I was never
4 quite sure I understood the constant or
5 individual differences between the
6 Schedules 2 and 3.

7 **Q. Okay. Other than what you**
8 **what you just described, do you generally**
9 **have a good handle on the Asbestos**
10 **Insurance Transfer Agreement?**

11 A. I wouldn't describe it as a
12 good handle, but I recognize some of the
13 paragraphs.

14 **Q. All right. Let me direct**
15 **your attention -- let's look at Section 1**
16 **on page 2, and you should probably look**
17 **at subsection (a). And then (d) is the**
18 **one I have the question on.**

19 A. Yes.

20 **Q. In (d), it says, "The**
21 **Transfer is not an assignment of any**
22 **insurance policy."**

23 **Do you see that?**

1 A. Yes.

1 **Q. What is it?**

2 A. It's an assignment of a --
3 do you mean what is the Transfer
4 Agreement?

5 **Q. Yes. What is the transfer,**
6 **which is a defined term?**

7 A. Being transferred?

8 **Q. Yes.**

9 A. The proceeds.

10 **Q. Anything else?**

11 A. Well, I confess as the
12 Futures Claims Rep, I never got past the
13 proceeds because the money was what
14 interested me.

15 **Q. Okay. Have you reviewed any**
16 **of the Debtors' insurance policies?**

17 A. No.

18 **Q. Have you ever reviewed a**
19 **general liability insurance policy?**

20 A. Yes.

21 **Q. Do you have a general**
22 **understanding as to the duties and**
23 **obligations of an insured under general**
24 **liability insurance policy?**

1 A. In general.

2 **Q. Could you describe for me**
3 **what some of those duties are?**

4 A. Well, you have to report
5 claims.

6 **Q. Okay.**

7 A. And you have to, under
8 certain policies, confer with the
9 insurance company about what you are
10 settling and why and for how much. And,
11 forgetting individual policies for a
12 minute, under corporate policies, there
13 are certain audit rights that sometimes
14 exist as a condition of payment to the
15 insured.

16 **Q. Are you familiar with the**
17 **requirement in some policies that the**
18 **insurer have a right to defend the**
19 **insured?**

20 MR. LIESEMER: Object to
21 form.

22 THE WITNESS: As well as an
23 obligation.

24 BY MR. BROWN:

1 **Q. Okay. And are you aware**
2 **that in some policies there is a right on**
3 **the part of the insurer to associate in**
4 **the defense of the insured?**

5 MR. LIESEMER: Object to
6 form.

7 THE WITNESS: I am not sure
8 I am familiar with that.

9 BY MR. BROWN:

10 **Q. Okay. Well, you indicated**
11 **that the one thing you knew that was**
12 **being transferred was proceeds.**

13 **Are you aware of anything**
14 **else that's being transferred pursuant to**
15 **the Asbestos Insurance Transfer**
16 **Agreement?**

17 A. I am not sure what you mean
18 by anything else, other than the money.

19 **Q. That's it?**

20 A. Well, other things may be
21 being transferred, but I can't think of
22 anything right now.

23 **Q. Okay. Do you have an**
24 **understanding as to whether the Asbestos**

1 PI Trust will become the insured under
 2 the policies that are listed on Schedule
 3 to this agreement?

4 MR. GUY: Objection, calls
 5 for a legal conclusion.

6 THE WITNESS: Mr. Brown, I
 7 don't know. I certainly hope so.

8 BY MR. BROWN:

9 Q. Do you have an understanding
 10 as to what, if anything, happens to the
 11 obligations of the insured under the
 12 policies on Schedule 1 if the Plan is
 13 confirmed?

14 MR. GUY: Objection to form.

15 MR. LIESEMER: I join in
 16 that objection.

17 THE WITNESS: Let me make
 18 sure I understand the question.

19 What happens to the obligations of
 20 -- if the policy was still in the
 21 hands of the Debtor, what would
 22 happen to the obligations of the
 23 Debtor and the rights of the
 1 insurance company?

1 that's responsive to your
 2 question.

3 BY MR. BROWN:

4 Q. What is it going to do?

5 What is the Trust going to do?

6 MS. BAER: Objection to
 7 form.

8 MR. LIESEMER: I join.

9 THE WITNESS: It's going to
 10 settle claims pursuant to the
 11 Trust Distribution Process.

12 BY MR. BROWN:

13 Q. Okay. Will the Debtors'
 14 insurers have any role in the handling
 15 defense or settlement of any claim
 16 submitted to the Asbestos PI Trust?

17 MR. GUY: Objection.

18 MR. LIESEMER: Objection to
 19 form.

20 MR. GUY: Objection, calls
 21 for speculation.

22 MS. BAER: Objection, same.

23 THE WITNESS: Let me address
 24 audit rights. In my copious free

1 BY MR. BROWN:

2 Q. I am not sure I understood
 3 the qualification. Let me try it a
 4 little differently.

5 To the extent that the
 6 Debtor has duties and obligations under
 7 one or more of its insurance policies, if
 8 this Plan is confirmed, what happens to
 9 those duties and obligations, as you
 10 understand it?

11 MR. LIESEMER: Object to the
 12 form.

13 MS. BAER: I join in the
 14 objection.

15 THE WITNESS: The Plan is
 16 going to be administered pursuant
 17 to the Trust Distribution Process
 18 as it affects personal injury
 19 asbestos claims.

20 To that extent, the personal
 21 injury Trust, as far as I know, is
 22 not going to call up each and
 23 every insurance company and say
 "Can I settle this claim?" I hope

1 time, Mr. Brown, I am the claims
 2 administrator of the Dow Corning
 3 Trust -- that is not an asbestos
 4 Trust -- and this issue has arisen
 5 in that context. And I dare say
 6 it may arise in the context of the
 7 W.R. Grace Trust.

8 If insurance companies
 9 object to paying because they do
 10 not have audit rights or because
 11 of any other input into the Trust,
 12 I dare say they are going to bring
 13 that to the attention of the
 14 trustees. And either that will be
 15 worked out between the trustees
 16 and the insurance company or
 17 some -- I don't like this phrase
 18 because I am not sure I know what
 19 it means -- but some coverage
 20 court will have to determine the
 21 rights of the insurance company as
 22 a function of the trustees'
 23 duties.

24 MR. BROWN: Could you read

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1 back the question?

2 (The reporter read from the
3 record as requested.)

4 BY MR. BROWN:

5 **Q. Other than what you just**
6 **described, will the Debtors' insurers**
7 **have any role in the handling defense or**
8 **settlement of asbestos PI claims into the**
9 **Trust?**

10 MR. GUY: Same objection as
11 to speculation.

12 MR. LIESEMER: Same
13 objection.

14 MS. BAER: Same.

15 THE WITNESS: I don't know
16 what the trustees are going to do
17 about that, so I don't know.

18 MR. BROWN: Why don't we
19 take five minutes.

20 (There was a break from
21 11:46 a.m. to 11:57 a.m.)

22 MR. BROWN: Let's go ahead
23 and mark this document.

1 (Austern-5 marked for

1 A. No.

2 **Q. Is there a reason for that?**

3 A. I don't know.

4 MR. BROWN: All right.

5 Let's mark this.

6 (Austern-6 marked for
7 identification at this time.)

8 BY MR. BROWN:

9 **Q. Mr. Austern, you have**
10 **another document in front of you now**
11 **marked Austern-6. It's Exhibit 10 to the**
12 **Exhibit Book.**

13 **Can you identify this**
14 **development?**

15 A. It is the Cooperation
16 Agreement between the Debtor and others.

17 **Q. And, again, this is one of**
18 **the documents that you reviewed in**
19 **preparation for today's deposition,**
20 **correct?**

21 A. I don't remember if I
22 specifically did it for that purpose, but
23 I have certainly reviewed it in the past.

24 **Q. Okay. What is the purpose**

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1 identification at this time.)

2 BY MR. BROWN:

3 **Q. Mr. Austern, you have been**
4 **handed what's been marked Austern-5.**
5 **It's Exhibit 4 to the Exhibit Book.**

6 **Can you identify it?**

7 A. This is the TDP for the
8 Plan.

9 **Q. I am correct, am I not, that**
10 **this is one of the documents that you**
11 **reviewed in preparation for today's**
12 **deposition?**

13 A. Yes.

14 **Q. Are you aware of any**
15 **provision in the TDP or the Trust**
16 **Agreement that we spoke about earlier**
17 **that provides for any role for the**
18 **Debtors' insurers in the handling,**
19 **defense, or settlement of any asbestos**
20 **claims submitted to the Trust?**

21 A. No.

22 **Q. Are you aware of any other**
23 **Plan document that provides for such a**
24 **role?**

1 **of this document?**

2 A. I am not sure I know the
3 legal purpose. It creates certain rights
4 and obligations between and among some of
5 the parties.

6 **Q. Okay. And who are those**
7 **parties?**

8 A. Well, the Debtor, the
9 Reorganized Debtor, and the Trust. I
10 mean the personal injury Trust.

11 **Q. The Debtors' insurers are**
12 **not a party to this agreement, correct?**

13 A. No.

14 **Q. We talked a little bit**
15 **earlier about general liability insurance**
16 **policies.**

17 **Are you generally familiar**
18 **with what's called duty to cooperate in a**
19 **general liability policy on the part of**
20 **the insured?**

21 A. Generally.

22 MR. LIESEMER: Objection to
23 form.

24 BY MR. BROWN:

1 **Q. If the Joint Plan is
2 confirmed and if there is a duty to
3 cooperate under a given policy, what
4 happens to that duty?**

5 MR. GUY: Objection, calls
6 for speculation.

7 THE WITNESS: Well, the
8 proceeds of the policy have been
9 transferred to the Personal Injury
10 Trust. I don't know what happens
11 to the duty of the Trust standing
12 in the shoes of the Debtor.

13 BY MR. BROWN:

14 **Q. So you don't know whether
15 the Trust steps into the shoes of the
16 Debtor with respect to the Debtors'
17 obligations under the policy; is that
18 what your telling me?**

19 A. I don't know.

20 MR. BROWN: I think I am
21 going to pass you to the next
22 questioner, Mr. Austern. Thank
23 you. Subject to maybe a few
1 follow-ups, I am finished.

1 **Exhibit-4, which is the Transfer
2 Agreement, and look at Schedules 2 and 3?**
3 A. (Witness complies with
4 request.)

5 **Q. Correct me if I'm wrong, I
6 believe you said you weren't sure what
7 the difference was between Schedules 2
8 and 3?**

9 A. In the sense that I don't
10 know why there are two schedules. I
11 mean, clearly different people are listed
12 under certain schedules.

13 **Q. Do you have an understanding
14 that the types of settlement agreements
15 are different on Schedule 2 and Schedule
16 3?**

17 A. I assume that's why there
18 are two schedules.

19 **Q. You previously also
20 mentioned that you understood that there
21 were three types of insurance agreements;
22 there were settlements -- there were
23 settled insurers, there were unsettled
24 insurers, and there were insurers are**

1 - - -
2 **EXAMINATION**
3 - - -

4 BY MS. ALCABES:

5 **Q. Hello, Mr. Austern. My name
6 is Elisa Alcabes from Simpson Thacher &
7 Bartlett. I am counsel for Travelers
8 Casualty and Surety Company.**

9 Travelers served a Notice of
10 Deposition on you. I am just going to
11 have that marked.

12 (Austern-7 marked for
13 identification at this time.)

14 BY MS. ALCABES:

15 **Q. Do you recall seeing this
16 notice?**

17 A. I saw many notices. I don't
18 know if I saw this one.

19 **Q. Okay. And are you familiar
20 at all with any of the agreements between
21 Travelers and W.R. Grace that were
22 entered into pre-petition?**

23 A. No.

24 **Q. Can you turn to Austern**

1 **coverage in place agreements or
2 reimbursement agreements? I am not sure
3 I said that exactly right.**

4 **I believe you said you
5 understood there were three types of
6 settled insurers -- three types of
7 insurers. I have got it right now.
8 Three types of insurers.**

9 **There are unsettled
10 insurers, fully settled insurers, and
11 insurers with coverage in place or
12 reimbursement agreements; is that right?**

13 A. That is my understanding.

14 **Q. And that's how you
15 understand this Plan to operate; is that
16 correct?**

17 A. Yes.

18 **Q. Okay. So do you understand
19 that Schedule 2 lists the fully settled
20 insurers, the insurers that have fully
21 settled agreements?**

22 A. What do you mean by fully?

23 **Q. Fully paid settlement
24 agreements.**

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1 MS. ALCABES: Can you give
 2 me two minutes? I may be
 3 finished.

4 (There was a break from
 5 12:24 p.m. to 12:25 p.m.)

6 BY MS. ALCABES:

7 **Q. I just have one more**
 8 **question, and it relates to the**
 9 **Disclosure Statement, which I don't know**
 10 **if I have a copy to mark as an exhibit.**
 11 **But I just want to read you one passage**
 12 **from Section 7.2.2(d)(iv).**

13 MR. GUY: I have one if you
 14 want to mark it.

15 MS. ALCABES: Thank you.

16 Let's mark this as Austern-8.

17 (Austern-8 marked for
 18 identification at this time.)

19 BY MS. ALCABES:

20 **Q. In my copy, it appears on**
 21 **page 105. Actually, I quoted it wrong.**
 22 **It's 4.7.2.2, Funding of the Asbestos PI**
 23 **Trust.**

4 A. 4.7.2?

1 **you know what that is referring to.**

2 A. I hesitate because I spent
 3 some time studying 7.2.2(d)(iv) or
 4 whatever this is, which is not here. It
 5 might help me if I could look at that.

6 **Q. 7.25.2(d)(iv)?**

7 A. Yes.

8 **Q. It's in the Plan, which is**
 9 **the section we were just looking at**
 10 **before on page --**

11 A. Wait a minute. I have not
 12 found the Plan. Yes. I am sorry.

13 **Q. It's on page 63 of the Plan.**

14 A. Okay. I am sorry. What was
 15 the question?

16 **Q. What does the reference to**
 17 **the literal terms of certain**
 18 **reimbursement conditions in the**
 19 **Disclosure Statement passage that I read**
 20 **to you mean?**

21 A. Well, to the extent I
 22 understand this -- and I am not positive
 23 this is responsive to your question --
 24 pursuant to some of the reimbursement

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1 **Q. 4.7.2.2, and I am going to**
 2 **direct you to the paragraph just before**
 3 **4.7.2.3, the paragraph that starts,**
 4 **"Section 7.2.2(d)(iv) of the Plan..."**

5 **Do you see that? Have you**
 6 **found it?**

7 A. No.

8 MR. GUY: It's on the bottom
 9 of --

10 THE WITNESS: Okay. I am
 11 sorry.

12 BY MS. ALCABES:

13 **Q. If you go towards the latter**
 14 **part of the paragraph, there is a**
 15 **sentence that starts, "As a result, the**
 16 **Plan Proponents believe that, without**
 17 **Section 7.2.2(d)(iv), the Asbestos PI**
 18 **Trust may not be able to fulfill the**
 19 **literal terms of certain reimbursement**
 20 **conditions in the Asbestos Insurance**
 21 **Reimbursement Agreements..."**

22 **And I would just ask you to**
 23 **refer to the literal terms of certain**
 24 **reimbursement conditions and ask you if**

1 agreements, an insurance company would be
 2 required to pay Grace money if Grace had
 3 paid a claim following judgment of the
 4 tort system or by way of settlement.

5 And what this is, I believe,
 6 saying is that that the insurer now has
 7 to pay Personal Injury Trust when the
 8 Personal Injury Trust pays a claim.

9 **Q. But, again, it doesn't speak**
 10 **to any other obligations that may exist**
 11 **under the reimbursement agreement on the**
 12 **part of Grace before it can demand**
 13 **payment from an insurer?**

14 MR. LIESEMER: Objection to
 15 form.

16 MS. BAER: Objection.

17 THE WITNESS: The document
 18 does not, that's correct.

19 BY MS. ALCABES:

20 **Q. So, for example, it does not**
 21 **address whether or not the Trust will**
 22 **have to allocate payments or provide**
 23 **reporting to the insurers or allow audits**
 24 **to be taking place, correct?**

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1 MR. LIESEMER: Objection to
2 form.

3 MS. BAER: Same.

4 THE WITNESS: The document
5 does not say that.

6 BY MS. ALCABES:

7 Q. **And the Plan does not say
8 that?**

9 A. And the Plan does not say
10 that.

11 Q. **And does the fact that the
12 Plan doesn't address the obligations --
13 strike that.**

14 **Does the fact that the Plan
15 doesn't address how the Trust will
16 perform obligations under a reimbursement
17 agreement impact your view as to whether
18 the Plan is fair as to the future
19 claimants?**

20 MR. GUY: Objection, lacks
21 foundation.

22 THE WITNESS: It does not
23 impact it.

4 BY MS. ALCABES:

1 need to speak up a little bit so everyone
2 can hear me.

3 MR. CANDON: I would like to
4 mark this as Exhibit-9.

5 (Austern-9 marked for
6 identification at this time.)

7 BY MR. CANDON:

8 Q. **It's the Notice of
9 Deposition. Do you recall having
10 received or have seen that?**

11 A. Yes.

12 Q. **I will start with another
13 exhibit here.**

14 MR. CANDON: Austern-10.
15 (Austern-10 marked for
16 identification at this time.)

17 BY MR. CANDON:

18 Q. **Can you tell me what that
19 is?**

20 MR. GUY: Do you have
21 another copy?

22 MR. CANDON: No, I don't.
23 This was an exhibit in
24 Mr. Lockwood's deposition.

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1 Q. **Why not?**

2 A. Because I believe the
3 insurance money is going to come to the
4 Trust, and I am only interested in the
5 money.

6 MS. ALCABES: I will pass
7 the witness. Thank you.

9 (There was a luncheon recess
10 from 12:31 p.m. to 1:05 p.m.)

12 AFTERNOON SESSION

14 EXAMINATION

16 BY MR. CANDON:

17 Q. **Good afternoon, Mr. Austern.**
18 My name is Chris Candon. I am from the
19 law firm Cohn Whitesell & Goldberg,
20 representing the Libby claimants. By
21 Libby claimants, it is terminology that
22 clients of our firm that are based in
23 Libby and expressed to asbestos exposure
24 in Lincoln County, Montana. I probably

1 BY MR. CANDON:

2 Q. **If you focus on pages 8, 9,
3 10.**

4 MS. BAER: What is it?

5 MR. CANDON: It's the 8-K
6 and the Term Sheet.

7 MS. BAER: And that's
8 Exhibit-10?

9 MR. CANDON: Yes.

10 BY MR. CANDON:

11 Q. **Do you recall having
12 participated in negotiations of this Term
13 Sheet?**

14 A. I participated in
15 negotiations of the Term Sheet. It was
16 in a somewhat different form than an 8-K,
17 but yes.

18 Q. **Other than the terms that
19 are embodied on the Term Sheet, were you
20 aware of any other agreements made with
21 respect to Plan proponents and going
22 forward?**

23 MR. GUY: Objection, vague.

24 MS. BAER: Objection to

1 form.

2 MR. GUY: Do you mean at the
3 time of the Term Sheet?

4 BY MR. CANDON:

5 **Q. At the time of the Term**
6 **Sheet, any separate agreements that the**
7 **terms are not embodied in that Term**
8 **Sheet?**

9 A. Do you mean between the
10 personal injury Trust and the Debtor?

11 **Q. Just any of the participants**
12 **or members of the agreement.**

13 A. I don't recall any.

14 **Q. Okay. Are you aware of any**
15 **oral agreements?**

16 A. No.

17 **Q. Okay. What agreements, if**
18 **any, were struck with respect to how**
19 **Libby claimants would be treated?**

20 MS. BAER: Objection to
21 form.

22 THE WITNESS: In the Term
23 Sheet?

4 BY MR. CANDON:

1 of the provisions are contained in
2 other Trust Distributions.

3 BY MR. CANDON:

4 **Q. Okay. The TDP refers to**
5 **values within the tort system in multiple**
6 **places. Section 2.1, the second sentence**
7 **is rather long, but we can read it here.**
8 **It says, "This TDP furthers that goal by**
9 **setting forth procedures for processing**
10 **and paying Grace's several share of the**
11 **unpaid portion of the value of the**
12 **asbestos personal injury claims generally**
13 **on an impartial, first-in-first-out**
14 **basis, with the intention of paying all**
15 **claimants over time as equivalent a share**
16 **as possible of the value of their claims**
17 **based on historical values for**
18 **substantially similar claims in the tort**
19 **system."**

20 **And in Section 5.3(b)(2), it**
21 **says in the second sentence that "The PI**
22 **Trust shall thus take into consideration**
23 **all of the factors that affect the**
24 **severity of damages and values within the**

1 **Q. Yes. You have already**
2 **testified that there were no other**
3 **agreements and no oral agreements, so I**
4 **am assuming there were no other**
5 **agreements. But I am asking you, are you**
6 **aware of any other agreements during the**
7 **negotiations of this Term Sheet?**

8 A. Of the Term Sheet, no.

9 **Q. Now I would like to turn to**
10 **Exhibit-5, which is the TDP.**

11 **Do you have that?**

12 A. Yes.

13 **Q. Who drafted the TDP?**

14 A. Well, that's a hard question
15 to answer because many, many, many of the
16 provisions, but not all, of this Trust
17 Distribution Process are incorporated
18 from other Trust Distribution Processes.

19 **Q. And so it was based on a**
20 **model from another case or from several**
21 **other cases?**

22 MS. BAER: Objection, form.

23 THE WITNESS: I am not sure
24 I would call it a model, but many

1 tort system including..., " and then it
2 goes on to list a number of factors.

3 **Is the TDP designed to pick**
4 **claimants values substantially similar to**
5 **the claim values that the claimants would**
6 **receive in the tort system?**

7 A. It is designed to create
8 scheduled values, but not necessarily
9 pay, that are similar to values in the
10 tort system.

11 **Q. Do you know why that's done?**

12 A. Why what's done?

13 **Q. Why they are scheduled**
14 **values similar to what's done in the tort**
15 **system?**

16 MS. BAER: Objection, form;
17 objection, speculation.

18 THE WITNESS: Well, the why
19 is simply the way it's done. I am
20 not sure I can tell you as an
21 underlying philosophical reason.

22 BY MR. CANDON:

23 **Q. Okay. Are you familiar with**
24 **Supreme Court case Butner versus the**

1 **Q. Why did you do that?**

2 A. Because it had been a long
3 time since I had looked at them.

4 **Q. Does the FCR have an opinion**
5 **on what the total value of the claims**
6 **that will be processed through the**
7 **anticipated Trust will be?**

8 A. I have relied on Ms. Biggs.

9 **Q. And what he is her current**
10 **view?**

11 A. Discounted back to the
12 petition date, the viability is between
13 \$3.2 and \$5 billion with her best
14 estimate, I think that's what it's
15 called, at 3.6.

16 **Q. And do you remember how much**
17 **nominal dollars that would involve**
18 **running through the Trust over time?**

19 A. Well, no, I don't.

20 **Q. It would be in her report.**

21 **Why do you think her number**
22 **is the most reliable?**

23 MR. GUY: Objection. He
1 didn't state that.

1 A. People who have an asbestos
2 personal injury claim against W.R. Grace.

3 **Q. Irrespective of whether or**
4 **not that claim would be compensable under**
5 **nonbankruptcy law?**

6 MR. GUY: Objection.

7 MS. BAER: Objection to
8 form.

9 MR. GUY: It
10 mischaracterizes his testimony.

11 THE WITNESS: Well, if it
12 can't settle or it goes into the
13 tort system, those are the two
14 ways in nonbankruptcy law that I
15 assume it could be compensated.

16 BY MR. COHN:

17 **Q. Well, you were appointed,**
18 **what, in 2004 --**

19 A. 2004.

20 **Q. -- as the FCR.**

21 **And in 2004, there were no**
22 **TDPs, right?**

23 MR. GUY: Objection.

24 THE WITNESS: You mean in

1 THE WITNESS: Well, first of
2 all, she is my expert. Second,
3 Dr. Florence has represented
4 Grace. I believe he said since
5 1995 or something -- I am sorry.
6 He doesn't represent them. He has
7 been Grace's future claims
8 forecaster since 1995. And
9 Dr. Peterson has done future
10 claims forecasting for the
11 plaintiffs bar for a long time.
12 They accidentally, or because of
13 that, represent the high and the
14 low figure, and Ms. Biggs
15 represents the in-between figure.

16 BY MR. COHN:

17 **Q. Now, you said that you are**
18 **the representative of future claimants**
19 **and your constituency is future**
20 **claimants, right?**

21 A. Yes.

22 **Q. How do you distinguish what**
23 **sort of people are entitled to be future**
24 **claimants?**

1 this case?

2 BY MR. COHN:

3 **Q. Right. There was no Plan;**
4 **there were no TDPs, correct?**

5 A. That's right.

6 **Q. Are you aware that there**
7 **are -- do you believe that there at the**
8 **time of petition were claimants against**
9 **W.R. Grace who had no symptoms of any**
10 **asbestos-related disease?**

11 A. I don't know.

12 **Q. Do you consider people that**
13 **in the future have no symptoms of**
14 **asbestos-related disease but bring a**
15 **claim against W.R. Grace to be part of**
16 **your constituency?**

17 MR. LIESEMER: Objection to
18 form, speculation.

19 MR. GUY: Same objection.

20 MS. BAER: Same.

21 THE WITNESS: Well, at the
22 risk of this being too
23 existential, of course, as soon as
24 they bring the claim, they are not

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1 my client.

2 I have never thought about
3 whether if you have been exposed
4 to W.R. Grace asbestos -- well,
5 let me back up a step.

6 You can be exposed to W.R.
7 Grace asbestos and never assert a
8 claim because you have no
9 manifestation of an
10 asbestos-related disease. I don't
11 know if those people are my
12 punitive clients or not.

13 BY MR. COHN:

14 **Q. Well, your job, as the FCR,**
15 **one of your jobs is to maximize the pool**
16 **of assets available for future claimants**
17 **to recover from eventually, correct?**

18 A. In many different ways, yes.

19 **Q. Is it also your job to**
20 **protect those future claimants from**
21 **having that pool of assets minimized by**
22 **claimants who are not really sick?**

23 A. That would include present
4 claimants, too, yes.

1 TDP that says everyone who can should be
2 fit under the umbrella of this Trust
3 Distribution Process.

4 **Q. What did you do -- strike**
5 **that.**

6 **Did you have any involvement**
7 **in the negotiation of the TDPs?**

8 MR. GUY: You may answer yes
9 or no.

10 THE WITNESS: Yes.

11 BY MR. COHN:

12 **Q. What was your involvement?**

13 A. I attended meetings; I
14 consulted with counsel; I consulted with
15 other parties.

16 **Q. What issues were you**
17 **particularly interested in?**

18 MS. BAER: Objection.

19 THE WITNESS: The Trust
20 Distribution Process.

21 BY MR. COHN:

22 **Q. Were there any areas where**
23 **you had disagreement with the ACC?**

24 MS. BAER: Objection. Now

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1 **Q. When the Trust is formed,**
2 **claimants will be beneficiaries of that**
3 **Trust, right?**

4 A. Yes.

5 **Q. Do you view it as part of**
6 **your job to advocate standards that**
7 **ensure only true beneficiaries are**
8 **compensated?**

9 MR. LIESEMER: Objection to
10 form.

11 MR. GUY: Objection.

12 THE WITNESS: If we could
13 agree on what a true beneficiary
14 was, yes.

15 BY MR. COHN:

16 **Q. What, to you, is a true**
17 **beneficiary?**

18 A. I think somebody who has not
19 been exposed to Grace asbestos is not a
20 beneficiary. I think somebody who has
21 been exposed to a Grace asbestos and has
22 no manifestation of an asbestos-related
23 disease or defect is not a beneficiary
24 subject to the prefatory language in the

1 you are going way beyond what we
2 agreed to --

3 MR. LIESEMER: I join the
4 objection.

5 MS. BAER: -- with Plan
6 proponents. I don't believe it's
7 appropriate inquiry for this
8 deposition.

9 MR. GUY: Can you repeat the
10 question?

11 (The reporter read from the
12 record as requested.)

13 MR. GUY: I am going to
14 instruct the witness not to answer
15 that because I don't see how he
16 can answer it without revealing
17 discussions with the parties that
18 are objecting to the revealing of
19 those discussions.

20 MR. COHN: So are we back to
21 where we have been in the Finke
22 deposition?

23 MR. GUY: I don't know. I
24 didn't go to the Finke deposition.

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1 MR. COHN: And the Lockwood
2 deposition, that as soon as I
3 start getting into substantive
4 issues about what happened in the
5 negotiation of the Plan of the
6 TDPs, I am going to face an
7 instruction not to answer on the
8 bases that Ms. Harding has set
9 forth previously?

10 MR. GUY: I didn't attend
11 Finke. I did attend Peter's. I
12 know that objection was raised,
13 but I also know that he got into a
14 lot of those issues. So we will
15 take it question by question.

16 MS. BAER: The Debtor will
17 object to any of those questions
18 being asked and answered.

19 MR. LIESEMER: So will the
20 ACC.

21 BY MR. COHN:

22 Q. Who besides the FCR and the
23 ACC was involved in the negotiation of
4 the TDPs, if anyone?

1 A. I don't remember anybody
2 else.

3 Q. So, as far as you know, the
4 TDPs were drafted in consultation between
5 the FCR and the ACC alone; is that
6 correct?

7 MR. GUY: Objection.

8 THE WITNESS: Well,
9 recognizing that the ACC included
10 a Libby claimant, the answer is
11 yes.

12 BY MR. COHN:

13 Q. Okay. Is it fair to say
14 that -- strike that.

15 In constructing TDPs, what
16 are the major concerns of you, as the
17 FCR?

18 A. The payment percentage; the
19 maximum available payment; the maximum
20 payment meaning the year; whether there
21 is sequencing, which in plain English is
22 if you are not paid -- if you are awarded
23 a payment but not paid because of maximum
24 available payment percentages, you get

1 interest called sequencing; inflation
2 issues; and the scheduled values.

3 Q. You want to maximize the
4 recovery for your constituency, correct?

5 A. Yes.

6 Q. You want to maximize the
7 likelihood that money is going to be
8 available to pay your constituency,
9 correct?

10 A. That's correct.

11 Q. You want to at the same time
12 maximize the payment to all beneficiaries
13 within the confines of making sure there
14 is enough money around; is that right?

15 MR. GUY: Objection as to
16 beneficiaries.

17 THE WITNESS: Well --

18 MR. COHN: Let me take that
19 back.

20 BY MR. COHN:

21 Q. Do you understand
22 beneficiaries to be those people who are
23 entitled to receive money from the Trust?

24 A. Yes.

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1 MR. GUY: Presents or
2 futures?

3 MR. COHN: Aren't the
4 futures and the presents all
5 beneficiaries of the contemplated
6 Trust?

7 MR. GUY: But your questions
8 have been asking about futures,
9 and the witness has been answering
10 as to futures. And now you are
11 bringing it back as to --

12 MR. COHN: I thought I was
13 talking holistically.

14 BY MR. COHN:

15 Q. Does your answer change for
16 the last couple of questions?

17 A. No. But I was going to say
18 the Plan -- the TDP and I believe the
19 Plan itself requires that all
20 beneficiaries be treated similarly. So
21 to the extent that I have to live with
22 that, the answer is yes.

23 Q. What is the FCR's view with
24 respect to the propriety of inflation,

1 increased payments to take account in
2 inflation?

3 A. I am in favor of that.

4 Q. What about interest on
5 sequencing?

6 A. I am agnostic.

7 Q. Now, you say the
8 contemplated PI TAC is going to be
9 Messrs. Budd, Cooney, Weitz, and Rice; is
10 that right?

11 A. Yes.

12 Q. Now, you understand that
13 each of them represents claimants who
14 will seek to recover from the Trust,
15 correct?

16 MR. GUY: Objection. This
17 actually will be the third
18 go-around on this issue, so I am
19 going to be indulgent but only in
20 a limited fashion.

21 THE WITNESS: I don't know
22 who their future clients will be,
23 but you are probably right.

4 BY MR. COHN:

1 foundation.

2 THE WITNESS: I don't know.
3 MR. GUY: This is
4 speculation.

5 BY MR. COHN:

6 Q. And the reason you exist in
7 this case is because, among other things,
8 you can't give notice to somebody that
9 doesn't know that he is going to get sick
10 some day?

11 A. That's among the reasons,
12 yes.

13 Q. And you are not aware of any
14 property owner in the United States that
15 isn't capable of being given notice of
16 the pendency of this bankruptcy case and
17 their ability to assert a claim, are you?

18 A. I can tell you in the
19 Manville case, the corporation in 1987
20 spent something like \$10 million giving
21 notice to people and there were people
22 who later claimed they hadn't gotten
23 notice. So I don't know if that's so.

24 Q. So you are happy that you

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1 have exculpation in the Plan; is that
2 right?

3 MR. GUY: Objection.

4 THE WITNESS: I am.

5 BY MR. COHN:

6 Q. Do you view obtaining that
7 protection as in any way presenting a
8 conflict between your personal interest
9 and your duties as the FCR?

10 A. What personal interest? I
11 don't know what personal interest you
12 mean.

13 Q. You have a personal interest
14 in not being sued by somebody after the
15 Plan is confirmed.

16 A. Well, I think that's taken
17 care of in the Trust Agreement, but
18 putting aside where my exculpation comes
19 from, yes. I don't think it creates any
20 conflict.

21 MR. COHN: Two minutes.

22 (There was a break from 2:13
23 p.m. to 2:20 p.m.)

24 BY MR. COHN:

1 Q. And you do understand that
2 they expect to take a contingency fee
3 payment from every dollar that they are
4 as successful at obtaining from the Trust
5 for their claimants?

6 MR. LIESEMER: Objection,
7 lack of foundation.

8 MS. BAER: Objection.

9 MR. GUY: Objection.

10 THE WITNESS: It is
11 traditional. I must tell you that
12 I know personal injury asbestos
13 lawyers who have waived fees.

14 BY MR. COHN:

15 Q. But that's not your
16 expectation with respect to these
17 gentlemen, is it?

18 A. I don't know.

19 Q. Earlier Mr. Brown asked you
20 about the PD FCR. Do you believe that it
21 is possible within this Plan to cut off
22 all property damage claims without the
23 need for a Trust?

24 MR. GUY: Objection, lacks

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1 **Q. How many meetings did you**
2 **personally attend in the course of**
3 **negotiating the TDPs?**

4 MR. GUY: Meetings with who?

5 MS. BAER: Objection.

6 BY MR. COHN:

7 **Q. I guess with the ACC would**
8 **be the other involved party that wasn't**
9 **your counsel.**

10 A. I am sorry. Are you
11 eliminating this to negotiating the TDP?

12 **Q. Yes.**

13 A. I would have to guess.

14 Somewhere between eight and 12.

15 **Q. Was there discussion of**
16 **whether or not to permit the insurers to**
17 **be involved in the processing of claims?**

18 MR. LIESEMER: Objection.

19 MR. GUY: Objection.

20 You can answer -- well, you
21 know what? I will defer to these
22 guys.

23 MS. BAER: Can you read back
1 the question?

1 as counsel for the FCR,
2 Mr. Austern not to answer the
3 question because the other Plan
4 proponents are raising
5 confidentiality issues with regard
6 to settlement discussions, and I
7 am adhering to that request.

8 And as the Court has stated
9 many times, negotiations are not
10 relevant and, therefore, would not
11 be admissible at the Plan
12 confirmation hearing.

13 MR. COHN: We disagree.

14 MR. GUY: Understood.

15 MR. COHN: I think I tested
16 your tolerance to where I am going
17 to get instructions not to answer.
18 I think I will stand down now and
19 let Mr. Plevin question.

20 -----
21 EXAMINATION
22 -----

23 BY MR. PLEVIN:

24 **Q. Good afternoon, Mr. Austern.**

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1 (The reporter read from the
2 record as requested.)

3 MS. BAER: Objection.

4 MR. LIESEMER: Objection.

5 MR. GUY: But do you want
6 the witness to answer?

7 MS. BAER: To the extent the
8 witness would have to reveal
9 discussions about negotiations of
10 the various Plan documents, I
11 would object.

12 If you can answer without
13 revealing that kind of
14 information, then I won't object.

15 THE WITNESS: I don't think
16 I can.

17 MR. COHN: So you are
18 instructing?

19 MR. GUY: Yes.

20 MR. DEMMY: Can I ask a
21 clarifying question? Who is
22 instructing the witness not to
23 answer?

24 MR. GUY: I am instructing,

1 A. Good afternoon.

2 **Q. Just so we are straight, I**
3 **represent Fireman's Fund Insurance**
4 **Company in this case only with respect to**
5 **issues concerning Fireman's Fund's proof**
6 **of claim and the indemnity agreement**
7 **between Fireman's Fund and Grace and the**
8 **supersedeas bond that Fireman's Fund**
9 **posted with respect to a case in Texas**
10 **that I want to ask you some questions**
11 **about.**

12 Let me start, first of all,
13 by asking if you are generally familiar
14 with the Edwards case in Texas?

15 A. Yes.

16 **Q. Can you tell me what you**
17 **know about that case in general?**

18 A. Mr. Reaud, R-E-A-U-D, I
19 think --

20 **Q. Correct spelling. I don't**
21 **know if the pronunciation is right.**

22 A. -- has a judgment on appeal
23 in an asbestos personal injury claim
24 against Grace in a number of millions of

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1 dollars. I think that's what I know --
2 which was stayed, of course, because of
3 the bankruptcy.

4 **Q. And in which the appeal was
5 stayed?**

6 A. The appeal was stayed.

7 **Q. And I will represent to you
8 that there were five plaintiffs who are
9 part of that judgment.**

10 But your understanding then
11 is that there was a judgment in the trial
12 court, correct?

13 A. Correct.

14 **Q. Which was appealed?**

15 A. Correct.

16 **Q. And that the appellate
17 proceedings were stayed by the Grace
18 bankruptcy?**

19 A. Correct.

20 **Q. Do you know that as part of
21 the appellate proceedings, Fireman's Fund
22 posted a supersedeas bond to enable Grace
23 to go forward on the appeal without
4 Grace's assets being immediately at risk**

1 MS. BAER: Objection. It
2 also seeks attorney-client
3 communication.

4 MR. LIESEMER: Same
5 objection.

6 MR. GUY: To the extent you
7 can answer without revealing
8 communications with your
9 counsel --

10 MR. PLEVIN: Let me just be
11 certain that I did not ask him for
12 any communications. I didn't ask
13 him what anybody told him or what
14 he said to anybody. I asked him
15 if he has a view.

16 He is a party to the
17 bankruptcy as the Future
18 Claimants' Representative, and he
19 either has a view or he doesn't.
20 If he has a view, I intend to ask
21 him what his view is and what the
22 basis for it is.

23 And if the point then is
24 that he can only say it based on

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1 for execution by the plaintiffs?

2 A. I have been told that.

3 **Q. Do you understand that in
4 connection with the issuance of the
5 supersedeas bond, Fireman's Fund and
6 Grace entered into an indemnity agreement
7 pursuant to which Grace agreed to
8 indemnify Fireman's Fund for any amounts
9 that Fireman's Fund paid pursuant to the
10 bond?**

11 A. I have been told that.

12 **Q. And do you know that
13 Fireman's Fund has filed a proof of claim
14 seeking to recover from Grace's estate
15 any and all amounts that Fireman's Fund
16 might be obligated to pay under the
17 supersedeas bond?**

18 A. I have been told that.

19 **Q. Do you have a view as to the
20 likelihood of success on Grace's appeal
21 or the strength of Grace's position on
22 appeal?**

23 MR. GUY: Objection, seeks a
24 legal conclusion.

1 counsel, that would be the proper
2 time to make that objection.

3 MR. GUY: I actually don't
4 think you can, because what you
5 are trying to elicit is expert
6 testimony from a lawyer about a
7 merits of a case that's pending in
8 court. And that testimony would
9 be barred on a 701 F.R.E. I don't
10 think you can ask that. It would
11 not be admissible in the
12 bankruptcy case.

13 If you can explain to me how
14 Mr. Austern's view about the
15 merits of a legal case would be
16 admissible before Judge
17 Fitzgerald, I would be happy to
18 hear it. Maybe you can try it
19 another way.

20 MR. PLEVIN: I am trying to
21 think of what the other way would
22 be.

23 MR. GUY: There is no good
24 way.

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1 **Mr. Austern, the concept of set-off in
2 bankruptcy?**

3 A. I understand set-off
4 generally as a proposition. I am not
5 sure I would apply it -- I don't know
6 that I know enough bankruptcy law to
7 apply it to bankruptcy.

8 **Q. Okay. What is your
9 understanding of the concept of set-off?**

10 A. Well, if I owe you \$10,000
11 and I have to pay Mr. Guy because you owe
12 him some money, I can set-off from what I
13 paid Mr. Guy what I owe you.

14 MR. PLEVIN: Can you read
15 that answer back?

16 (The reporter read from the
17 record as requested.)

18 BY MR. PLEVIN:

19 **Q. Are you aware, Mr. Austern,
20 that Grace has made claims for insurance
21 coverage against Fireman's Fund under
22 liability insurance policies issued by
23 Fireman's Fund?**

4 A. Yes.

1 **Q. And that the insurance
2 coverage claims Grace has made at least
3 include, if not -- they are not limited
4 to claims for coverage of asbestos
5 personal injury claims?**

6 A. I am sorry. Can you say
7 that again?

8 **Q. I got a little tied up
9 there.**

10 **Grace is seeking coverage
11 from Fireman's Fund under the Fireman's
12 Fund insurance coverage policies for
13 asbestos personal injury claims asserted
14 against Grace, correct?**

15 A. Yes.

16 **Q. Do you have a view as to
17 whether in the event that Fireman's Fund
18 is obligated to pay insurance coverage to
19 Grace, Fireman's Fund would be able to
20 reduce that obligation by any amount that
21 Grace is obligated to pay under the
22 indemnity agreement?**

23 MR. GUY: Objection. I
24 don't see how he can answer that

1 question without getting into a
2 legal analysis. He is here as a
3 fact witness.

4 But, again, let me talk to
5 my client, and I think we can
6 resolve it with the answer.

7 MS. BAER: We join in the
8 objection.

9 (There was a discussion held
10 off the record at this time.)

11 THE WITNESS: I have no
12 view.

13 BY MR. PLEVIN:

14 **Q. Do you have a concern that
15 if the Edwards appeal were to be --
16 withdrawn.**

17 **Do you have a concern that
18 if the Edwards judgment were to be
19 affirmed on appeal and Fireman's Fund
20 paid money to Edwards and then made a
21 claim against Grace for the amount paid,
22 that that would in some way reduce the
23 amount of money coming into the Trust
24 from the Fireman's Fund insurance policy?**

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1 MR. LIESEMER: Objection to
2 the form.

3 MS. BAER: Objection.

4 MR. GUY: Objection to form.

5 THE WITNESS: Mr. Plevin, I
6 have any concern that the activity
7 might reduce the amount of
8 insurance coming into the Grace
9 Trust. And I understand this is
10 approximately \$6 million. And if
11 Fireman's Fund were to reduce its
12 payment or be entitled to reduce
13 its payment under the Fireman's
14 Fund policy for asbestos personal
15 injury to the Trust and it would
16 reduce it by \$6 million, yes, I
17 have a concern.

18 BY MR. PLEVIN:

19 **Q. And I am sure this has been
20 established on the record long before I
21 came here, but let me just ask this
22 question for foundational purposes.**

23 **You are an attorney,
24 Mr. Austern?**

1 A. Yes.
2

3 Q. And you have practiced law
4 for how many years?
5

6 A. 45.
7

8 MR. PLEVIN: Thank you. I
9 have no further questions.
10

11 MR. CALOGERO: I have no
12 questions.
13

14 MR. WISLER: Maryland
15 Casualty has no questions.
16

17 MR. GUY: Are there any
18 insurers on the phone who have
19 questions?
20

21 Scotts? BNSF? Do you have
22 any questions?
23

24 MS. COBB: Yes. This is
17 Tiffany Cobb on behalf of The
18 Scotts Company, LLC, with Vorys,
19 Sater, Seymour and Pease. Can you
20 hear me?
21

22 MR. GUY: Yes. Hi, Tiffany.
23

24 - - -
1 EXAMINATION
2 - - -

1 BY MS. COBB:
2

3 Q. Mr. Austern, in your
4 capacity as the Asbestos PI Future
5 Claimants' Representative, what fiduciary
duties do you owe?
6

7 MR. GUY: Tiffany, we
8 covered that earlier in the
9 deposition. Were you listening
in?
10

11 MS. COBB: I was.
12

13 MR. GUY: I just don't want
14 to have a lot of duplicity in the
questioning. I will allow this
one.
15

16 THE WITNESS: I have a
17 fiduciary duty to future
18 claimants.
19

20 BY MS. COBB:
21

22 Q. But what are the duties?
23

24 A. Essentially to make sure
there is sufficient funds, that when they
file claims they will be treated the same
or similarly to present claimants.
25

26 Q. In your capacity as the FCR,
27

1 who specifically do you view as your
2 punitive clients?
3

4 A. Future claimants.
5

6 Q. Okay. And in your capacity
7 as the FCR then, do you owe a fiduciary
8 duty to asbestos PI claimants as defined
9 in the Plan who hold future demands
against any entity that is addressed in
the definition of an asbestos PI
claimant?
10

11 A. Can you repeat the last part
12 of that. Against whom?
13

14 Q. Sure. Against any entity
15 that is addressed in the definition of
asbestos PI claimant?
16

17 A. Yes.
18

19 Q. In your capacity as the FCR,
20 do you owe a fiduciary duty to
21 indirect PI Trust claimants who hold future
22 demands against the Debtors?
23

24 A. Yes.
25

26 Q. In your capacity as the FCR,
27 do you owe a fiduciary duty to
insurance-related claimants who hold
28

1 future demands against any settled
2 insurance company?
3

4 A. I think I would have to go
5 back and look at the definition of those
people.
6

7 Q. Okay. Then let's do that.
8 If you would, please, look at Exhibit-5
9 which is the TDP, and if you would please
look at Section 5.12.
10

11 A. I am looking at it, but give
me a moment.
12

13 Q. Sure.
14

15 A. Okay. What was the
question?
16

17 Q. In your capacity as the FCR,
18 do you owe a fiduciary duty to
19 insurance-related claimants who hold
20 future demands against any settled
21 insurance companies?
22

23 A. I don't know. I would have
24 to think about that. I realize they
could be indirect claimants, at least I
think they could be indirect claimants.
So I would have to think about that. I

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1 During any Plan negotiations
 2 in which you were involved which led to
 3 the present Plan of Reorganization, going
 4 back to 2004, was property damage
 5 discussed, including ZAI?

6 MS. BAER: Objection. This
 7 goes into discussions with Plan
 8 negotiations which Plan proponents
 9 have already agreed is beyond the
 10 inquiry of what this witness can
 11 testify about.

12 MR. LIESEMER: The ACC joins
 13 in the objection.

14 MR. GUY: Dan, I am sorry.
 15 I have to agree with them. The
 16 answer to this question will
 17 necessarily reveal substance of
 18 communications.

19 MR. SPEIGHTS: And I
 20 understand that, and I am asking
 21 simply for a yes or no answer as
 22 to was property damage discussed
 23 in his presence. You have not yet
 1 instructed him not to answer. I

1 claimant may have no other source of
 2 exposure?

3 A. If by source of exposure,
 4 you mean nobody else to recover from, the
 5 answer is yes, it could.

6 Q. I am not sure what you mean
 7 by nobody else to recover from. There
 8 may be another source of exposure. Or
 9 are you saying if everybody else was
 10 broke, then that would place them in the
 11 same category?

12 A. Well, I haven't thought
 13 about if somebody -- well, I will give
 14 you an initial reaction. I think if
 15 everyone else is broke, then, yes, they
 16 would be entitled to a greater payment
 17 because there was no one else to recover
 18 from.

19 MR. SPEIGHTS: Mr. Austern,
 20 that's all I have for you at this
 21 time. For the record, I certainly
 22 wish to reserve my right to
 23 question Mr. Austern when I am
 24 able to question him concerning

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1 am not sure what your position is
 2 on that.

3 MR. GUY: I am going to
 4 instruct the witness not to answer
 5 because I don't see how he can
 6 answer that without revealing the
 7 substantive communications either
 8 with a yes or a no answer, i.e.
 9 they took place.

10 BY MR. SPEIGHTS:

11 Q. Mr. Austern, is there any
 12 difference in the amount paid to a
 13 mesothelioma victim from a sole exposure
 14 to Libby vermiculite and from
 15 mesothelioma victim who was exposed to
 16 Grace and other products as a part of
 17 general construction trade?

18 A. If the scheduled value is
 19 the same. If somebody seeks individual
 20 review, it could result in a different
 21 number.

22 Q. And, among other reasons,
 23 could it result in a different number
 24 because in many instances, the Libby

1 the negotiations which led to the
 2 proposed Plan insofar as property
 3 damage is concerned and on the
 4 other subjects that he was
 5 instructed not to respond to.

6 Have a nice weekend,
 7 Mr. Austern.

8 THE WITNESS: Thank you,
 9 Mr. Speights.

10 MR. GUY: I think, for the
 11 record, the only thing that
 12 Mr. Austern is being instructed
 13 not to answer your questions on
 14 were with regard to the
 15 negotiations. The transcript will
 16 say what it says.

17 Is there any other party
 18 that would like to ask questions
 19 of Mr. Austern?

20 MR. BROWN: I have one.

21 MR. HARRIS: This is Daniel
 22 Harris for the Unsecured
 23 Creditors' Committee. I don't
 24 have any questions for

1 Mr. Austern, but I would like to
 2 read a statement into the record,
 3 if that's okay.

4 As counsel for the
 5 Creditors' Committee that Plan
 6 proponents have previously
 7 discussed and agreed the
 8 Creditors' Committee may seek a
 9 subsequent deposition of
 10 Mr. Austern or any other person or
 11 persons solely in connection with
 12 Plan feasibility issues. Thank
 13 you.

14 MR. GUY: Mr. Brown.

15 - - -
 16 EXAMINATION
 17 - - -

18 BY MR. BROWN:

19 Q. Mr. Austern, I have a few
 20 follow-up questions mainly to what
 21 Mr. Cohn questioned you about.

22 I think one of the documents
 23 that the Libby claimants' counsel handed
 24 you was an 8-K. I don't recall the name

1 were any of the Debtors' insurers
 2 consulted about any term of this Term
 3 Sheet prior to April 6, 2008?

4 A. Well, I didn't consult with
 5 them, so I don't know. I did not consult
 6 with them.

7 Q. Are you aware of anyone else
 8 consulting with them?

9 A. No.

10 Q. To your knowledge, did any
 11 of the Debtors' insurers consent to any
 12 term in the Term Sheet prior to April 6,
 13 2008?

14 A. Not that I know of.

15 Q. Now, the initial Joint Plan
 16 was filed in September of 2008, correct?

17 A. Yes.

18 Q. Would I be correct in
 19 assuming that between April 6, 2008 and
 20 September 2008 that the Plan proponents
 21 were working on the terms of the Plan and
 22 Plan documents?

23 A. I was, and I know others
 24 were.

1 of it. Do you have it there?

2 A. I have it here. I have it.

3 Q. Okay. And attached to that
 4 8-K there is a Term Sheet, correct?

5 A. Yes.

6 Q. And I believe your testimony
 7 was earlier that you have seen this Term
 8 Sheet but some other iteration of it; is
 9 that correct?

10 A. Yes.

11 Q. Not in the form of an
 12 attachment to an 8-K?

13 A. Oh, no. I meant I have seen
 14 a printed version of this.

15 Q. Okay. But, in substance,
 16 it's the same document as what is
 17 attached to the 8-K?

18 A. Yes.

19 Q. Okay. You will agree with
 20 me, will you not, that the Term Sheet is
 21 dated April 6, 2008?

22 A. If you will tell me -- yes,
 23 it is.

24 Q. Okay. To your knowledge,

1 Q. Okay. And would I also be
 2 correct that in that time period the Plan
 3 proponents and their counsel were
 4 drafting Plan documents?

5 A. I know my counsel was.

6 Q. In that time frame, April 6,
 7 2008 to September 2008, to your
 8 knowledge, were any of the Debtors
 9 insurers' consulted about any of the
 10 terms in the Plan or Plan documents?

11 A. I do not know of any
 12 consultations that took place.

13 Q. Okay. To your knowledge,
 14 were any of the Debtors insurers'
 15 consented about any term in the Plan or
 16 Plan documents in that time frame?

17 A. Well, having not been
 18 consulted, I would be surprised if they
 19 consented, but I don't know if they
 20 consented.

21 Q. All right. Now, in your
 22 prior testimony, in answer to one of
 23 Mr. Cohn's questions, you indicated that
 24 you were aware of circumstances in which

1 plaintiff's personal injury attorneys had
 2 waived their fees?

3 A. Yes.

4 Q. Putting those circumstances
 5 aside, do you have an understanding as to
 6 what the customary contingency fee
 7 arrangement is for plaintiffs' asbestos
 8 personal injury lawyers?

9 MR. LIESEMER: Objection to
 10 the form. No foundation.

11 THE WITNESS: I know what it
 12 is in the Manville Trust because
 13 the Manville Trust dictates what
 14 it will be.

15 BY MR. BROWN:

16 Q. Okay.

17 A. Putting that aside, I think
 18 it depends on the case. I am familiar
 19 with the fact, for instance, that medical
 20 malpractice attorneys charge a somewhat
 21 higher contingency fee than others do. I
 22 am not sure I know what the standard fee
 23 is for asbestos personal injury.

4 Q. Do you have any idea what

1 Plan?

2 A. Not that I know of.

3 Q. Why?

4 A. I don't know.

5 Q. Are you aware of other
 6 asbestos trusts where there is a cap with
 7 respect to contingency fees that can be
 8 paid to plaintiffs lawyers?

9 A. You did say asbestos trusts?

10 Q. Yes.

11 A. I do not know of any other
 12 asbestos trust that has a cap.

13 Q. Focusing for a moment on the
 14 CE Trust, are the TAC members paid for
 15 their services as TAC members?

16 A. You know, I don't remember.
 17 I know there is a provision to pay their
 18 expenses. I can't remember if they are
 19 paid. I just know I am paid.

20 Q. Well, that's important.

21 How about with respect to
 22 this Trust in the Grace bankruptcy? Do
 23 you know whether the TAC members will be
 24 paid in any fashion for their services

1 Mr. Cooney's firm charges by way of
 2 contingency fee?

3 A. No.

4 Q. Mr. Weitz?

5 A. No.

6 Q. Mr. Rice?

7 A. No.

8 Q. Mr. Budd?

9 A. No.

10 Q. Anyone?

11 A. No.

12 Q. You mentioned that there is
 13 a cap -- I am not sure you used the term
 14 "cap" -- there is a fee in the Manville
 15 Trust Agreement?

16 A. Yes.

17 Q. Is it a cap?

18 A. No -- it is a cap. It says
 19 the fee cannot exceed 5 percent.

20 Q. Okay. How did that term
 21 come about in the Manville Trust?

22 A. In words of one syllable,
 23 Judge Weinstein insisted on it.

24 Q. Is there a cap under this

1 TAC members?

2 A. Do you mean other than
 3 expenses?

4 Q. Yes.

5 A. And I don't recall any
 6 specific provision.

7 Q. Okay. I found it.

8 A. Which page?

9 Q. Page 32.

10 A. Are we in the Plan?

11 Q. No. We are in the Trust
 12 Agreement, page 32 of the Trust
 13 Agreement.

14 A. I am sorry. Just a minute.
 15 What page?

16 Q. 32, Section 5.6.

17 A. I seem to have an agreement
 18 that's out of pagination. Just a moment.

19 Yes. 5.6, yes, they are
 20 paid -- I stand corrected -- an hourly
 21 rate.

22 Q. All right. Do you have any
 23 understanding today as to what the hourly
 24 rate will be for the members of the TAC

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1 if the Plan is confirmed?

2 A. No, I don't.

3 Q. Do you have any view as to
4 what the hourly rate would be if the Plan
5 is confirmed?

6 A. I confess, Mr. Brown, having
7 forgotten that they are entitled to an
8 hourly rate, I would have to think about
9 that. But I, at this point, have no
10 view.

11 Q. Okay. Do you have a view as
12 to whether they should be paid that
13 hourly rate above and beyond whatever
14 fees they get from their individual
15 clients who recover from the Trust?

16 A. If Section 5.6 gives them
17 the right to get the hourly rate, I think
18 they should get the hourly rate.

19 MR. BROWN: I think that's

20 all. Thank you, Mr. Austern.

21 MR. CANDON: I have one
22 follow-up question.

23 MR. GUY: Sure. Go ahead.

4 - - -

1 CERTIFICATE

2
3
4 I HEREBY CERTIFY that the witness
5 was duly sworn by me and that the
6 deposition is a true record of the
7 testimony given by the witness.

8
9
10
11
12
13 Lori A. Zabielski
14 Registered Professional Reporter
15 Dated: MAY 17, 2009

16
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19
20 (The foregoing certification
21 of this transcript does not apply to any
22 reproduction of the same by any means,
23 unless under the direct control and/or
24 supervision of the certifying reporter.)

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1 EXAMINATION

2 - - -

3 BY MR. CANDON:

4 Q. Mr. Austern, you had
5 mentioned that you reviewed Mr. Biggs'
6 estimation report, and the figure was
7 somewhere exactly between, you said, 3
8 and 5 billion?

9 A. Let me explain. There was a
10 follow-up letter to the report. The
11 report I believe said 3.8, and it was
12 reduced to 3.6 because of the
13 mathematical error.

14 Q. Did she provide a separate
15 estimate for Libby claims?

16 A. No, she did not.

17 MR. CANDON: Okay. That's
18 all I have. Thank you.

19 MR. GUY: Okay. We are
20 done.

21 (The deposition concluded at
22 3:27 p.m.)

1 INSTRUCTIONS TO WITNESS

2
3 Please read your deposition over
4 carefully and make any necessary
5 corrections. You should state the reason
6 in the appropriate space on the errata
7 sheet for any corrections that are made.

8 After doing so, please sign the
9 errata sheet and date it.

10 You are signing same subject to the
11 changes you have noted on the errata
12 sheet, which will be attached to your
13 deposition.

14 It is imperative that you return
15 the original errata sheet to the deposing
16 attorney within thirty (30) days of
17 receipt of the deposition transcript by
18 you. If you fail to do so, the
19 deposition transcript may be deemed to be
20 accurate and may be used in court.